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THE OLD LAW AND THE NEW ORDER
MORAL OVERSTRAIN

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The Old Law and the New Order

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BY

GEORGE W. ALGER



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To
My Mother

Oct 1891 Dr. Gordon Jackson. 2

Foreword

OF the papers which this volume contains, four, "Executive Aggression," "The Courts and Legislative Freedom," "Treadmill Justice," and "Criticizing the Courts," were published in the *Atlantic Monthly*; three, "Discontent with Criminal Law," "The Police Judge and the Public," and "Punishing Corporations," appeared in *The Outlook*, and "The State as Employer" was published in *The Independent*. To the editors of these publications I am indebted for the privilege of republication, and to the Yale University Press for its permission to include in this volume "The Ethics of Production," an address which I delivered in the Page Series of Lectures at Yale, and which is included in their volume of these addresses for the year 1909, *Morals in Modern Business*. "The Law and Industrial Inequality" was a paper read before the State Bar Association of the State of New York. These papers, with occasional exceptions, have been to a greater or less extent revised before republication.

NEW YORK, January, 1913.

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I

Executive Aggression

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I

Executive Aggression¹

THERE is no present fact in the actual workings of American governmental machinery which is more obvious than the great increase in power and influence of executive authority, and the corresponding decline of that of the lawmaker. This involves a great change from the conditions which existed when our national life began. The Colonial Governor was the hated representative of the Crown. His every act was watched with suspicion and jealousy by the legislatures, which represented the people and stood between them and royal tyranny. This attitude continued long after the freedom

¹ This paper was written in 1908. Occasional statements may impress the reader as not accurately descriptive of present conditions. With this word of explanation this paper is printed without revision.

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of our country had been established, and the Governor had become the elect of the people rather than the choice of the Crown. The authority of the Governor was limited not only by law, but by public opinion, because the old fear of executive despotism still continued and died hard.

In our national life the historians tell us that the very existence of a federal executive, separate and uncontrolled by Congress, was due to a mistake, to a then current misconception of the British Constitution, and to the adoption by us of what Mr. Bagehot describes as the "literary theory" of that Constitution rather than its fact. Roger Sherman, in the Constitutional Convention, suggested that "the executive magistracy is nothing more than an institution for carrying the will of the legislature into effect ; that the person or persons occupying that office ought to be appointed by, and to be accountable to, the legislature only, which was the depositary of the supreme will of the people. As they were the best judges of the business which ought to be done by the executive department, he wished the number might not be fixed, but that the legislature should be at lib-

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erty to appoint one or more as experience might dictate." Roughly speaking, this was and is the English system, under which there is no separation of executive and legislative functions, but the Government is responsible for the enactment of new laws and the enforcement of old ones.

Owing to a misapprehension of what the English system was, Sherman's suggestion was not followed; but the failure to accept his proposition was not due to any dissent in the convention from Sherman's notion of what were the essential functions of the executive, and the relatively greater importance of the legislative, branch of government.

It is quite the fashion to-day to look back to the era of such opinions, to consider the jealously limited authority of the early Colonial Governors, and the original concept of the functions of the federal executive, as expressed by Sherman, and contrast them with the current practice and opinions as to these offices to-day.

There has been a great increase in the power and influence of executive officers since the days when the memory of the Crown Governors was fresh in the minds of people, when the first

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President was suspected of a desire to be a king. In the past decade that growth of power has been most marked. Governors are taking in state matters positions of authority which would have been impossible a century ago. The President exercises a power to-day over the affairs of the nation which neither Congress nor the people would have tolerated in George Washington.

These changes, these developments, of executive power, have been made without any substantial change in our state constitutions and with none in that of the nation. The letter of the law remains. Nominally, the system is as our fathers made it. In practice, it is essentially a different thing. This variance between our principles and our practice has not developed unnoticed. It has been observed and has been often discussed. This growth of executive authority has not taken place without opposition from minds familiar with the history of our Constitution.

Critics whose voices have at times been raised in protest against it have described it as executive aggression. The phrase itself implies hostility. It implies usurpation of ungranted power. Presumably what those who use the phrase mean is that,

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notwithstanding the clear language of state and national constitutions which describe and define the power of executive, legislative, and judicial officers ; despite the power of the legislatures to assert and maintain their own prerogatives ; despite the great and peculiar power of our courts to declare the constitutional limitations of executive authority, the Governor in the state and the President in the nation are exercising power in excess of that conferred by the constitutions made by the people.

If this charge related solely to some one person, if it were merely that some one particular Governor had succumbed to the itch for power, if it were only that the President now in office had been guilty, as his opponents have often charged, of dictating legislation, of domineering over Congress and of talking about his policies and purposes with a directness and frankness which would have made the early Congresses gasp and stare, it would be less important. But it is a common and general charge, and has been made in recent years against almost every Governor who has accomplished anything and who has left his office with a record of public service.

Within certain narrow limits, this matter of

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executive aggression is a legal question. Again and again, in solemn conclave, the bar has discussed it, and asserted and reasserted the constitutional requirements that executive, legislative, and judicial functions must be kept separate. Learned lawyers, familiar with the letter of the law and with the ancient theory of the division of governmental power, have sounded a dignified note of warning against executive poachings of power. Many addresses on specific instances of such alleged usurpations have been made by distinguished jurists, but for some reason these protests seem to have had little effect either on executive conduct or upon the public mind.

The cases of executive aggression, however, involving an actual overstepping of constitutional boundaries, have been few, and when they have occurred their seriousness has often been exaggerated. What we have to consider is not so much a matter of law as one of public opinion. It is the change in the attitude of the people toward the executive office, and the enormous increase in the power of the executive which has resulted from it.

The criticisms from the jurists have consid-

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ered rather the letter of the law than the spirit of the people, and have generally taken the form of a more or less acrimonious arraignment of some particular executive for some particular act of alleged transgression, as though in him and his reachings for power lay the whole source and origin of the supposed offense. Some of these critics are distinguished statesmen and well-known lawyers, and it is with considerable hesitation that I venture to suggest that such criticisms fail to take into consideration the real cause of the conditions against which they protest, a cause which seems apparent on taking a broader field of observation.

The pith of this executive aggression business is in the fact that the people have come to expect something to-day of the executive which a quarter of a century ago they did not expect or require. Consider our actual practice. When we elect a President, we elect a man whom the majority believes to be wise enough and strong enough to rule the nation. We expect him to carry into effect policies which he deems advantageous to the common weal by causing Congress to pass his measures, using upon Congress such compulsion as may be necessary to have it

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accept his purposes. We expect the President and his officers to initiate constructive legislation, and to attend to getting it made into law. We even expect him to decide what particular laws are to be enforced by his law officers.

Because we expect that when he is elected he will do all these things, we are before election interested in knowing his ideas, what policies he has, and what laws he proposes to enforce. If, after election, he fails to accomplish the things he has told us about before election, if Congress rejects his measures, if he does not put his policies into law, if he enforces unpopular law, he need not try to shift the blame to others. It is he, not Congress, who has failed us. If he fails to get congressional support, he has simply shown himself inefficient. We may elect senators and representatives, but it is the tendency to hold the President responsible for what they do. We expect him to exercise dominion, not only over Congress, but over the law itself. We expect him to use executive wisdom in selecting what laws shall be enforced, and in deciding not to enforce bad laws. We make much the same kind of demand upon our Governors in the states.

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Does this statement of our expectations seem exaggerated? Does it represent only the demands of the foolish, or of those unfamiliar with our institutions and ignorant of the exact legal limitations of executive authority? Is it too much to say, for example, that we expect the President or the Governor to decide what laws shall be enforced and what let alone, although his oath of office gives him no such discretion? Take a practical illustration of the spirit which demands this form of executive aggression, an expression coming not from an ignorant source, but from one of the most conservative and law-wise of New York papers, one famous for printing all the news that is fit to print.

In an editorial calling President Roosevelt to task for what it described as his "ill-judged zeal" in enforcing the Sherman Anti-Trust Act, it said recently, "He is the only public man who has declared that he would enforce the law, although he was aware of its defects. How much better would have been his position, and the country's position, if he had asked indulgence in the non-enforcement of the law until it was fit to be enforced." What the paper wanted the President to do was to commit what

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it describes as "a technical neglect of his official oath," by refusing to enforce a law which the newspaper, the President himself, and a great many other people think is hopelessly crude and illogical, but which thousands of fervent souls consider an enactment paralleled only by the Ten Commandments. Any newspaper reader would have little difficulty in finding editorials similar in spirit to the one just quoted.

The theory of responsibility, which puts upon the executive the duty to exercise executive common sense in selecting the laws which "deserve to be enforced," is not recognized even in quarters from which strenuous opposition would seem most to be expected; that is, the legislature itself. A rather bleak, elderly little lawyer with heavy glasses was addressing one of the committees of the New York Legislature some six months ago. He was complaining bitterly about the hardships of a factory law, whose provisions he assured the much-bored committee pressed heavily upon a certain large Buffalo plant which he represented. In the midst of his argument one of the senators interrupted him. "Let me ask you a question. Has the Commissioner of Labor been unreasonable in the way he has en-

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forced it on you?" The lawyer wiped his glasses and smiled deprecatingly. "Why, he hasn't prosecuted us, sir." "Has he prosecuted anybody, so far as you know?" persisted his questioner. Why, no, not so far as I know, but the law is there, and—" "Do you mean to tell me," interrupted the senator, in a voice swelling with indignation, "that you have been wasting half an hour of this committee's time on a statute which has occasioned you absolutely no grievance—which, so far as you know, has n't been unreasonably or unjustly enforced against anybody?"

This question to all practical purposes closed the debate. The little man with the glasses endeavored to stem the tide running strongly against him by futile remarks about the law being on the statute-books, that it might be enforced, and so forth, until the chairman mercifully finished him by intimating that they had a long calendar and must now take up Senate Bill No. 263.

Into my sympathetic ears the little man later poured his opinion of the committee. A few of his phrases were quite choice, and I retailed some of them later to the Socratic senator who had been the subject of them. He listened good-

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humoredly. "Theoretically he was right," he admitted, "but where should we be if we spent our time repealing all the dead-letter statutes?"

The senator who saw no special reason for repealing a bad law, provided it was not enforced, doubtlessly considered himself a practical man. He expected the Governor's representative, the Commissioner of Labor, to use common sense in enforcing the laws which were his to enforce. If the law proved to be an unreasonable one and not "practical," he expected the executive through this commissioner to use discretion and common sense again by letting it alone. If this common sense was being used,—if no one was being prosecuted,—then there was no urgent need that the law should be repealed. Hence, while in theory it ought to be repealed, practically there was no need that a busy legislature, struggling with a long calendar of proposed new laws, should be troubled with it. The senator was expressing the new political theory, which slowly but certainly is growing up in this country, and which is in direct conflict with the old constitutional theory of divided and coördinate powers. It may be described as the theory of executive common sense, a theory the applica-

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tion of which doubles the responsibility of the executive by diminishing that of the legislature almost to the vanishing point.

When the legislature itself recognizes this theory, and in instances like this affirms the right and duty of the executive to select the laws which ought to be enforced; when the people demand from the executive that he use a strong hand upon the makers of laws to compel them to enact such new laws as he desires; when the public in almost every controversy between the State Governor and the Legislature, or between the President and Congress, is to be found lined up in support of the executive and clamorous for the submission of the legislative branch to the will of the executive, what does it all mean? What has brought this change about?

To a very marked extent this change is due to our American methods of legislation. We are a practical people, and have confronting us a distinctly practical problem which presents itself to us in about this fashion. Our legislatures, most of which have bi-annual sessions, pass every two years some twenty-five thousand separate laws. In 1906-07, for example, there were passed by Congress and state legislatures 25,446 acts

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and 1576 resolutions. At a conservative estimate, twenty thousand of these were local laws, affecting separate cities and towns and having no general scope whatever, or were special bills relating to private interests only. In England in the entire nineteenth century there were enacted some twenty-one thousand special and local bills. In America our legislatures pass as many of these laws every two years. In 1906 and 1907, while our American legislatures were turning out these twenty-five thousand laws and fifteen hundred resolutions, the attention of the British Parliament was concentrated upon one hundred and fourteen public acts and general laws.

Sixty years ago England laid the foundations of a scientific plan for handling local and private bills. There had been political corruption in the granting of franchises in England, as well as in our own country, in the early days of railroad development. The unscrupulous, who sought unjust advantages and special privileges through legislation, applied to Parliament then, much as they apply to our state legislatures now. The Standing Orders adopted in 1847 in England afford a method of dealing with local and private measures, by which an investigation closely akin

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to a judicial trial by a parliamentary tribunal is made of each of these bills, on fullest advance notice to every public and private interest which its enactment might affect. Under this plan, corruption has lost the secrecy which gives it its main opportunity, and the undivided time of Parliament itself is devoted to more important public matters. In 1907, substantially the entire lawmaking work of Parliament itself is embodied in fifty-six general public acts, contained in two hundred and ninety-three printed pages. In the same year, the State of New York enacted seven hundred and fifty-four laws, occupying twenty-five hundred pages.

The legislative methods of that state are characteristic American methods. Every municipality in New York, for example, goes to the legislature for every amendment to its local charter. When Buffalo wants a Polish interpreter for a police court, when Yonkers wants to raise the salary of its city judge, when Cohoes wants to build a bridge, or Dunkirk to build sewers, when Fulton wants some new fire-hose for its fire department, or Little Falls wants to raise the pay of its police, when Albany wants to fix the salary of a deputy superintendent of an almshouse,

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they go to the legislature of the state and ask for a law.¹

¹ At a meeting in September, 1912, of the newly organized Municipal Government Association in New York, whose purpose is to free the cities of the State from the senseless bondage to the legislature which results in this type of "local" bill, a high authority upon Municipal Government, Mr. J. Hampton Dougherty, delivered an address in which he analyzed the amendments, adopted during a series of years, to the charter of New York City. He said : —

"The present Greater New York was organized in 1897 under a charter granting a slight measure of municipal independence. That charter was revised in 1901 along similar lines. But between 1897 and the revision of 1901 the legislature passed 58 separate acts amending the charter of 1897; between the revision of 1901 and the fall of 1907 the legislature amended 267 sections of the charter of 1901, and added 46 new sections. Between 1897 and 1907 it passed 650 separate and special acts, each directly affecting the property, government, or rights of the city.

"Nor has the legislature been less active since 1907 in changing the New York City Charter. In 1908 it passed 71 amendments; in 1909, 25 amendments; in 1910, 28; in 1911, 34; and in 1912, 49. It also, in each of those years, passed a number of special statutes directly affecting the city's government. In 1908 there were 25 such enactments; in 1909, 29; in 1910, 59; in 1911 the year of the famous Levy Election Law, 32; in 1912, 23.

"The habit of appealing to Albany for legislation, either amending the city charter or in the form of special acts affecting the city's purse or government, has been a growing evil from 1857 onward. Prior to 1857 it was a cardinal principal that the city was master of its own government, with the right to originate its form of charter, and to have that charter submitted to vote of the people of the city. As Mr. James Bryce has forcibly observed : 'Since this date the largest city of the American con-

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What does an assemblyman or senator from New York City know about the necessity for a Polish interpreter in a Buffalo police court, or for hose in the fire department of Fulton? Why should he know anything about such remote matters? The prevailing American method of legislation, however, expects him to vote upon such things. In American legislatures, not only bills of this kind, but bills creating franchises for corporations, granting special privileges, establishing private interests, are introduced by the hundred and passed by the score, without advance publicity of any kind or a semblance of careful investigation. Is it extraordinary that, with their legislatures constantly occupying themselves with matters which are no part of the real business of the public, the public look elsewhere when seeking to have that business performed? That they look to the Governor and his advisers, rather than to the legislature itself; and look to him,

the city has lain at the mercy of the state legislature, and the legislature has not scrupled to remodel and disarrange the governmental institutions of the city. Its charter has been subjected to a continual "tinkering" that has made the law uncertain and a comprehension of its administration extremely difficult.'

"This is true not only as to New York City, but to a degree as to every city of the state. This evil habit of constantly altering or revising city charters pervades the entire state."

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not only to initiate needed general laws, but by his personal authority and his veto to dam the swelling flood of special and local bills as well?

The constant complaint of the reformer is that the people pay too little attention to the doings of the representatives who make the laws. Is it possible for the people of a state to follow, with interest or with profit, the work of a legislature occupied for the most part with bills of this kind? Is it to be wondered at that the public recognizes its inability to focus its mind on these things, and turns the whole matter of legislation over to the supervision of the Governor? It has been said, not without a show of reason, that, unless there be a return to the old principle of local self-government, the only practical alternative for the people is a benevolent despotism by the Governor — an elective despot.

Among the forgotten books of political philosophy, there is one which, perhaps more than any other, should be remembered in America — because it is the philosophy which stood at the beginning of the American Revolution; a philosophy, the attempt to apply which was one of the great causes of that Revolution. This book was Bolingbroke's "The Idea of a Pa-

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triot King." In that work, written at a time when parliamentary government was at its lowest ebb, and English politics a sink of corruption, when rotten boroughs flourished and the votes of unrepresentative representatives had to be bought on every important measure, Bolingbroke advocated the control of Parliament, and of the legislative affairs both of England and her colonies, by the strong hand of a patriot king. Bolingbroke believed that the vigorous use of the royal prerogative by a patriot king ruling with wisdom, and controlling by a strong hand Parliament and the affairs of the nation, would afford a practical solution for the evils created by a corrupt, inefficient, unrepresentative, and factional Parliament. America did not accept this doctrine then. The idea of a patriot king collapsed under George III. His attempt to put this philosophy into effect was among the causes of the Revolution which separated us from Great Britain.

One of the great contributions of America to British freedom came through our refusal to accept this new political doctrine. The patriot-king theory disappeared in England after the Revolution. A cure for the conditions which

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the patriot king and his prerogative proposed to cure was found in a reformed Parliament and a better system of representation. Those who seek a practical solution for our present legislative difficulties, in an extraordinary increase of the influence of the executive over the affairs of the state and the nation, are offering us the patriot-king theory in a new form. If we do not really want it, we must recognize the reasons which give that theory an apparent justification in America to-day, and destroy the doctrine by destroying the causes which have brought it into existence.

Unconsciously, by instinct rather than by direct reasoning, the people are realizing that our lawmaking machinery has broken down; that, in their methods of legislation, our legislatures are to-day struggling with the impossible. The American voter realizes, moreover, the absolute impossibility that any average citizen, who has any business of his own to attend to, can know anything about these special and local bills, which, under prevalent crude and clumsy methods, clog the calendars of the legislatures. We realize that in our respective states the greater part of the time of our legislators is

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engrossed in mulling over these bills and passing them by the score, when on the final vote not one legislator in ten has any real understanding of either the propriety or the necessity of their enactment. We realize that the time misspent upon these measures is necessarily taken away from the consideration of general public acts dealing with the common interests of all of us ; and that, because of this enormous volume of special legislation, the statute-books tend to get filled with bad laws, bad because ill-considered and hastily passed, — because in this confused muddle of hasty lawmaking, the lawmakers themselves lose the sense of responsibility. It is physically impossible for us to watch all these bills, or to watch the men who make a business of passing them. What are we to do ?

The answer which we make perhaps unconsciously is this : Let us put it all up to the Governor or President. Let us elect a good Governor. Let us elect a President we can trust, and turn over to him the whole business of managing this machinery of lawmaking in our behalf.

In this way and for this reason, consciously

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or unconsciously, we are remoulding our institutions. In spite of our American Constitution, in spite of our traditions of divided powers, we are to a large extent trying, in practice, the established English principle by which, as that best of foreign-born Americans, Mr. Bryce, puts it, "The Executive is primarily responsible for legislation and, to use a colloquial expression, 'runs the whole show,' — the selection of topics, the preparation of bills, their piloting and their passage through Parliament." The English system recognizes no theoretical separation between executive and legislative functions. The Government is at once the source of the country's general legislative plans, its lawmaker, and its enforcer of law. We, in turn, are in practice tending toward a similar scheme of actual government. In practice, we have reversed the theoretical course of legislation. We expect the President and the Governor to initiate legislation to meet general public requirements, and that those general public acts shall come, not from the legislature, but from the executive and his advisers. We expect in the enforcement of law, moreover, that the executive will ignore laws which are not fit to be en-

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forced. We have adopted this plan because we realize that the thing which stands between us and legislative chaos is executive aggression. That which to-day protects us from legislatures as good as we deserve is an executive better than we deserve. We have asked for that executive aggression, and we cannot consistently complain when we get it. Until the method and scope of our legislation changes, we shall need it.

The condition which makes executive aggression has other phases not less important. Certain conservative minds are complaining, for example, of what is called "federal aggression." With our state legislatures struggling with bills regulating the local affairs of cities and towns, there has been and can be no general progress toward uniformity of laws among the states, a uniformity absolutely necessary for the success of interstate business, which yearly increases enormously in volume. Because there is no progress toward uniformity of state law, the people are asking that the Federal Constitution be stretched so that we may get that uniformity through national law. What hostile critics describe to-day as federal aggression is

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in a large measure the attempt by federal law to meet that demand for uniformity of law which the state legislatures have neglected and ignored.

The continuance of inefficient methods of lawmaking is, moreover, one of the most conspicuous sources of a certain lawlessness which, we can but admit, characterizes us as a people. In the country where laws are made on the wholesale plan by bad methods, in enormous quantities, in great haste, the respect of the people for law is bound to diminish and at times to disappear.

The same cause which tends to promote executive aggression tends, moreover, to make that aggression increase, rather than decrease, in scope and function, by making the individual legislator a cipher, by taking from his work dignity and importance, and thereby causing the office itself to be filled by third-rate men.

As I was conversing sometime ago with two intelligent, well-educated voters, residents of a county adjoining the city of New York, one of them expressed regret at the failure of his party to reëlect a local assemblyman. To my suggestion that the man had proved himself stupid in

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office, and that his failure to be reëlected was no great loss to the assembly, they replied, "He knew enough to vote 'Yes' for what the Governor wanted, and that was all he had to know." That was what the office of assemblyman for their district meant to them.

This point of view has many adherents. The legislature tends to become a body whose function, so far as the public generally is concerned, is to pass local bills, and on public measures to register the policies and legislative plans of the executive. To find intelligent and independent men who will care to accept legislative office under such conditions is growing harder each year, a fact which adds still more to the importance of the executive as the real source from which constructive legislation is to emanate.

The English Constitution, as some one has said, consists not of documents, but of certain ideas on political principles shared by the vast majority of thinking Britons. On our own side of the water, we have written constitutions perfectly clear in their general scheme, which declare the separation of powers, executive, legislative, and judicial. But instead of this distribution

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being one of our fixed political ideas, there are now cross-currents of conflicting opinions. Those who believe in practicing the theory of the Constitution, at any cost to the country, are at war with those who believe in getting the right thing done, at any cost to the theory and regardless of possible future consequences. The chief executives in the state and nation stand at a point where these cross-currents meet. No more embarrassing position can be imagined than that of the President or Governor who tries to keep a clear course between those who think that he should be nothing but a business manager, and those who insist that he should be the general executive officer and a working majority of the board of directors as well.

A still further embarrassment comes to him from the empirical standards of the press. For the newspapers, plainly reflecting public opinion, ally themselves at times with one school and at times with the other, and make the whole matter of executive conduct one, not of law, but of good taste. The newspaper which to-day scolds the President for refusing to usurp the function of Congress by practically repealing the Sherman Law "until it is fit to be enforced," pre-

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sumably would see nothing illogical to-morrow in calling him an arrogant despot in case he should declare the Pure Food Act, for example, unfit to be enforced, and should notify Congress that the law would remain a dead letter until a better one was enacted. Judged either by law or by logic, the executive aggression involved would be no greater in one case than in the other. The mere fact that one course of conduct would please the newspaper and the other would not, is but a suggestion of a government by newspaper,—a different form of aggression, which, however, does not lack advocates.

Those who talk about executive aggression as though its origin were the mere itch for power of individuals, placed in temporary positions of authority, would do well to study the real source of the tendency by which they are sometimes justly alarmed. Public opinion, tired of legislative inefficiency and irresponsibility, has developed a fancy for despotism in its demand upon the executive to get things done. Until we reform our methods of legislation, this seems likely to continue. So long as our present methods remain in vogue, executive interference in legislative matters bids fair to continue, not

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in defiance of public opinion, but with its very general assent, approval, and support.

There are those who desire a return to the theory of the Constitution, but who do not see that any appreciable progress can be made by mere general abuse of executive officers for so-called aggression, while ignoring the present reason and practical justification of that aggression. The return to the theory can be accomplished when common sense has been restored to the purposes and methods of legislation. When that has been done, executive usurpation will disappear. The public opinion which now supports and encourages it will then refuse even to tolerate it. The return to the Constitution, the old American theory of divided powers and duties, is desirable, but it can be accomplished in no other way ; for we are a practical people, and if we are to have theories, we insist that they shall be theories which work.

II

The Courts and Legislative Freedom

II

The Courts and Legislative Freedom

TWENTY-FIVE to fifty years ago there were time-honored phrases which were applied by lawyers with more or less popular approval to the American judiciary. The courts were the "Palladium of our liberties," the "Guardians of the Ark of the Covenant." To-day the public attitude has largely changed. These phrases are no longer current. The people are dissatisfied with the guardians, and in some quarters there is dissatisfaction with the ark itself. The popular magazines are full of articles upon judicial aggression, judicial oligarchies, and the lucubrations of ingenious laymen, who, unconstrained by any embarrassment through knowledge of law or of the functions or powers of the judiciary, cheerfully lay at the doors of the courts all the ills of our body politic. The legislatures and constitutional conventions are debating proposals for the recall of judges, and the bar associations are adding to the general

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confusion by sweepingly denouncing, as demagogic attacks upon the courts, all proposals of change except certain excellent though tardy measures of procedure reform emanating from themselves. The platform of one political party advocates a simplification of the method of impeachment. Between indiscriminate attack and unreasoning defense, the courts suffer both from their enemies and, if possible, still more from their friends, and sober-minded citizens are left without light or leading.

What is the fundamental thing which has aroused this tumult of conflicting charges, this spirit of bitterness, these recriminations and attacks? At bottom, the difficulty will be found to be a change in the attitude of the people, not towards the courts themselves, but towards law-making bodies, and the desire to readjust in an essential particular constitutional power as between the courts and the lawmaking bodies by the only feasible method which our complicated system affords — direct application of public opinion.

To attempt to analyze the process of this change would be difficult, and no broad generalization can be made which would not appear

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in some quarter to be glaringly inaccurate. For one matter, there has been in our country in recent years a decided growth in actual democracy. Despite occasional flashes of its ancient power, government by political oligarchies, boss rule, is losing ground. Invisible government is giving way to visible government of a better type. For another matter we have passed industrially from individualism to collectism, and our law has not yet adapted itself to the transition. A condition of interdependence socially and industrially requires recognition and regulation by law. Senator Root has with great felicity expressed it in a recent address :

Instead of the give and take of free individual contract, the tremendous power of organization has combined great aggregations of capital in enormous industrial establishments, working through vast agencies of commerce and employing great masses of men in movements of production and transportation and trade, so great in the mass that each individual concerned in them is quite helpless by himself. The relations between the employer and the employed, between the owners of aggregated capital and the units of organized labor, between the small producer, the small trader, the consumer, and the great transporting and manufacturing and distributing agencies, all present new questions for the solution of which the old reliance

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upon the free action of individual wills appears quite inadequate. And in many directions the intervention of that organized control which we call government seems necessary to produce the same result of justice and right conduct which obtained through the attrition of individuals before the new conditions arose.¹

There is beneath all a spirit of restlessness in the people not to be overcome by soporifics or reactionary forebodings, a dissatisfaction with things as they are and a demand upon law-making bodies for greater service in harmonizing law to the requirements of a changed industrial order. To meet these new conditions new measures are required. They must proceed from lawmakers. In response to that demand in the states and in the nation, long-neglected subjects of legislation are receiving attention. With this growing interest in such matters, the lawmaker and those interested in legislation upon these topics find in certain fundamental parts of the work of legislation a conflict of power between the lawmaker and the courts.

Such a conflict is more or less essential in any system of checks and balances like ours. With us it has in fact always existed, but just now the

¹ *Judicial Decisions and Public Feeling*. An address before the New York State Bar Association, January 19, 1912.

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force of public opinion is more largely on the side of the lawmaker and those whom he represents in the demand for legislation than in the days when he was generally discredited and distrusted, and when he was less the representative of the people and more that of a boss-ridden party system.

The sphere of power of the lawmaker, under our present system of checks and balances as interpreted by our courts, is the arc of a pendulum, which has the phrase "due process of law" at both extremities. How wide the pendulum may swing depends upon how far the courts consider it lawful that the legislature should go before coming in conflict with the phrase.

It will be said at once that this statement is incorrect because every state constitution, as well as that of the nation, has a multitude of limitations upon legislative action and the provision that property shall not be taken without due process of law is only one of them. This criticism is not without merit. But the "due-process" clause is the principal example of those broad general expressions current in our constitutions, which, not placed there by the courts, are nevertheless to be construed and given a

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meaning and a force as limitations of legislative and executive power. This provision is the great stumbling-block of the lawmaker, because it is not defined except in vague generalities by the courts and is not readily susceptible of definition. For illustration, take a subject with which a dozen American states are now struggling and on which there is an aroused public opinion, — industrial accidents. A Workmen's Compensation Act is under legislative consideration. A bill is drawn which recognizes as in Europe that such accidents are an inevitable part of modern industry and are chargeable justly upon the industry itself, and provides for compulsory compensation by the employer for all accidents occurring in his plant irrespective of whether occasioned by his fault. Does it take property without due process of law? The lawmaker looks to see what "due process" is declared to mean by the courts. What does he learn? He learns first that the words are equivalent to "the law of the land" as used in Magna Charta. This is historically interesting, but to him of no practical value. He then learns, if he looks a little further, that what he has tried to find out by judicial decision, the courts them-

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selves have refused to define, except in terms which afford no practical help, saying that these words are incapable of accurate definition, and that it is wiser to ascertain their intent and application "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning with which such decisions may be founded." "It must be confessed," says the United States Supreme Court, "that the constitutional meaning or value of the phrase 'due process of law' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several states and of the United States."

The courts say, in substance, to the lawmaker: "We can give you no rule or definition for this thing which shall enable you to know what due process of law is before you legislate, but if you pass some law, and afterwards it is questioned in court, we can then tell by application of this indefinable thing, by our process of inclusion and exclusion, whether the particular law is void or not as taking property without due process of law."

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When a law has been enacted and is being tested in court, the brief of the lawyer who attacks it is usually full of illustrations of other statutes more or less like it, which courts have held to be bad as taking property without due process of law. The brief of the lawyer in favor of the law is based on such cases, if any he can find, in which statutes more or less similar have been declared valid, and with these cases he has generally an argument that this particular kind of a statute which he desires to uphold is what he calls a valid exercise of the police power.

Now, the legislator is interested in both of these things. If he cannot know in advance what is due process of law which tells him what he must not do, he will be quite safe about his statute-making if he can know what is the scope of the police power which tells him what he can do. Upon searching among court decisions for a definition of this police power, so-called, he finds there is no concrete definition of it. It is also incapable of definition. The courts do of course describe it. In a thousand decisions it is referred to as the power of the lawmaking body "to promote the health, peace, morals, education, and good order of the people by the enact-

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ment of reasonable regulations for that purpose."

But since it is incapable of exact definition and there are no certain rules governing it, the courts again say the question whether a law is a valid exercise of the police power must be determined by testing the individual statute by application. "With regard to the police power as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides." The courts will examine the statute. If they find that in their judgment the legislature adopted it in the exercise of a reasonable discretion and based upon sufficient facts, they will hold the law to be a valid exercise of the police power. To forbid barbers to work on Sunday is reasonable. To forbid women to work at night is unreasonable. So the first law is a valid exercise of the police power, and the second takes liberty and property without due process of law.

In the meanwhile what becomes of the law-maker? He is endeavoring to respond to the demands of the people for legislation on questions which, without any constitutional puzzles injected into them, are in themselves difficult in

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the extreme. New conditions need new remedies. He devises the new remedy. He introduces it as a bill, which contains some limitations upon the conduct of some class or body. It is debated in committee. It is amended to meet objections. It is debated in the two houses. It is passed. It is examined by the Governor and his advisers. It becomes law. Then it goes to the court and if three out of five men, greatly learned in law, applying the judicial mystery of due process of law, decide that the thing attempted is, as they see it, not a reasonable exercise of the discretion of the legislature in imposing the restraint or regulation proposed, the wisdom of the two branches of the legislature and of the Governor is overcome. The law is not a law.

The thing which the courts in these decisions are dealing with is that process of adjustment, inevitable in law as in life, between the rights and liberties of the individual and the rights and necessities of society. The police power, so-called, is in law the branch which expresses the expanding needs of society and through which its demands upon the individual are made. Society asserts, by legislation based upon the police

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power, the necessities of social coördination for the development of the state. The individual—or more often some one pretending to act in his interest—resists, through the “due-process” clause, the encroachments of society upon “natural” right.

The problem thrust upon the courts is the duty of harmonizing, without set rules or chart or compass, the relations of man, the individual, to the society in which he must belong. Plato declared that he was ready to follow as a god any man who knew how to combine in his conduct the law of the one and the law of the many. How infinitely more difficult the task of prescribing such conduct not for one’s self only, but for the one and the many of a complex state. It is the most difficult of tasks. It is imposed upon no other courts than ours in the world. The duty which Milton took upon himself in his epic of justifying the ways of God to man is in our time only paralleled by the duty of American courts of justifying the ways of society to man and of man to society.

The theory of procedure in this process of justification, to be sure, is simple. Show us, say the courts, a necessity of society so great as

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to require the subordination of the personal rights of the individual to the greater demands of the aggregation of individuals composing the whole and we will sustain the law which causes that subordination. Show us a case where for an alleged social need, but having no just cause or basis, the rights of the individual are threatened with arbitrary destruction, and we will in turn protect the individual from such a law by declaring that his life, liberty or property cannot be taken without due process of law.

The essential conflicts between the courts and legislatures on these subjects are over questions of fact. The legislature says, for example, We have found as a fact a social necessity for limiting the hours of labor of bakers. We have examined into the condition of their work and find that their welfare, and thereby the welfare of society, requires such limitation. The Supreme Court of the United States says that there are no reasonable grounds for believing that such social necessity exists, and it finds the law to be unconstitutional in taking away the baker's liberty.

As to the hours of women in laundries and men in mines, the court approves the legisla-

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tive finding of social fact, declaring these to be cases "where the legislature has adjudged that a limitation is necessary for the preservation of the health of such employees and there are reasonable grounds for believing that such determination is sustained by the facts. The question in each case is whether the legislature has adopted the statute in the exercise of a reasonable discretion or whether its action be a mere excuse for an unjust discrimination or the oppression or spoliation of a particular class."

The opportunity for conflict between the legislature and the courts on questions of social fact is apparent. In this conflict public opinion finds itself more and more on the side of the legislature. This shift in public opinion does not come because the majority of people are convinced that legislators are wiser than courts or less prone to make mistakes, but is born of a more general realization of the fact that solutions for industrial and economic questions are necessarily legislative ones, and that to deny the legislator the power to make mistakes is also to deny him the power to remedy or correct evils which can receive correction only through legislation. Underlying a great part of the current

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discussion of the judiciary and as a main basis for the recall-of-judges nostrum is this matter of the potential domination of the legislative idea of reasonableness by the judicial idea of reasonableness.

The irritation and impatience manifested towards the courts thus engendered, the conservative deprecates and deplures. As a process of adjustment of such difficulties he repeats the time-honored argument that the true remedy is to meet these conflicts one by one with the cumbrous, difficult, and dilatory procedure of piecemeal constitutional amendment. The suggestion that the situation can be met in any other fashion or by any change of attitude of the courts themselves, he regards as sheer demagoguery. What the conservative refuses to see, in his resistance to the new forces in public opinion, is that the more progressive or radical influences in our society are themselves endeavoring to accomplish an essential conservative reform through this insistence upon the recognition by the courts of the need of greater legislative freedom. That they are endeavoring to find a *modus vivendi* in our constitutions for an ancient and time-honored clause which, upon the con-

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servative's own logic, they should seek to repeal.

It is essential that we should see the true nature of this conflict and the alternative which it affords. We must do one of two things, either determine to continue our courts in their present position of harmonizers between the individual and society and thereby continue in form and theory their present power over legislation, looking to the courts themselves for such practical modification of their exercise of that power as shall give a necessary leeway to legislation, or, what has not yet been suggested, we must abolish vague constitutional limitations and decide that an impracticable and unworkable power of the courts over legislatures should be removed by a repeal of the clause or clauses of the constitutions forming the basis for its existence.

As a conservative as well as a practical people, we are trying the first of these alternatives. Without changing the theory of judicial power in any fundamental way, we are seeking to have it practically so applied by the courts as to enlarge the province of legislation. We are endeavoring to accomplish this largely by a

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severe criticism of judicial decisions which interfere with what many now recognize as an essential part of legislative freedom.

We are asking to have the courts themselves recognize an extension of the ordinary domain of legislative power, that is, the domain in which the lawmaker may enact his statute without being obliged to claim justification for what he enacts in any special plea of social necessity,—the police power. The extent of this common field of legislation depends largely upon the breadth of action permitted by the courts in their definition of due process of law. One definition of the test for due process in the constitutional sense of the term has been laid down by many decisions of the courts.

We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of procedure existing in the common and statute law of England before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

More briefly they describe it as “a conformity

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with the ancient and customary laws of the English people.”

If the basis for determining whether we can do certain things legally in the twentieth century is to be found by ascertaining whether they could legally have been done in England at or prior to the 4th day of July, 1776, the problem of grasping new conditions in new ways by new laws is made infinitely difficult. The touchstone for progress then becomes not solely the needs of the present, but the extent to which these needs can be met by the application of historical precedents of the past. Nations are incapable of growth in any such fashion by any such method.

It is doubtless true that, historically, due process of law, as understood and applied in England from the days of Magna Charta to the time we adopted our Constitution, contained far fewer limitations upon executive and legislative powers than those which have been construed into it by American courts in the past hundred years. But it is the method of progress which is important. No man can run forward freely while continually looking backward.

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There is, however, another view of due process consistent with national growth. As the Supreme Court of the United States has said:—

The Constitution of the United States was ordained, it is true, by descendants of Englishmen who inherited the traditions of English law and history, but it was made for an undefined and expanding future and for a people gathered and to be gathered from many nations and from many tongues, and while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. . . . There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age, and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful form.

The theories of due process of law, the narrow one, which makes its touchstone history and the settled usages and modes of procedure used in England prior to our independence, and the broad one, which sets aside all such

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limitations and gives the phrase the expansive power by which there may be created in America law not only for the descendants of Englishmen, but for a people gathered from many nations and many tongues, express an actual but not yet fully recognized conflict between the courts themselves.

The expansionist and the contractionist notions of due process of law are expressed in many judicial decisions. They conflict at times in the decisions of the same courts. Both cannot live. The permanence of our constitutions in their present form depends upon the establishment of a broad doctrine of legislative power. What may be called the expansionist theory is to-day rapidly gaining ground. The notion that the courts form an adamant barrier to progress is false. They do not bow to every fitful breath of change. Some judges move more slowly than others, to be sure, in adapting the law to the settled will of the people. But to that will they do conform. What is taking place is a slow but sure change under the pressure of formulated public opinion in the character and scope of the constitutional limitation of due process of law.* Even when found

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by many most alarming, the movement from which this pressure comes is essentially a conservative one. Nowhere has there been from any respected source the suggestion that the whole framework of our constitutional system should be destroyed or that the power of the courts to annul acts which contravene the clause should itself be destroyed. This in itself is a tribute to the courts. If the people were satisfied that the power to declare laws unconstitutional under the due process clause had been in the main detrimental to their best interests, that its continuance was necessarily or essentially a menace to the progress of the nation, the reform movement would have a different programme. "No," said the old farmer, "I don't want a divorce ; what I want is a leetle more freedom on lodge nights."

The people do not desire to abolish the ancient landmarks. There is as yet no expressed desire on the part of any group or party to take from the courts the power to test legislation by ascertaining whether it conforms to natural and inherent principles of justice, or the power to forbid that one man's rights or property shall be taken for the benefit of another or for the bene-

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fit of the state without compensation, or that any man should be condemned in his person or property without an opportunity of being heard in his own defense.

No other country in the world permits its courts to test or to approve or condemn legislation by the application of any vague concept such as "natural and inherent principles of justice" or by the interpretation of phrases incapable of approximately exact meaning which law-makers can know in advance. In theory, at least, the continuance of a constitutional system for governing ninety millions of people on such a basis involves peril if not disaster. "Yes," said an English barrister to me some months ago, "things are pretty bad with us just now. A lot of this Lloyd George legislation is stuff and nonsense, too. Of course Parliament had to do something, though, and with us, to be sure, it has a pretty free hand, but," he added cheerfully, "if we were tied up with your Constitution we should be having a civil war."

A civil war is too remote a prospect to arouse in an American much sense of alarm. Our natural resources are still vast. The field of individual opportunity, though narrowing, is still

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large. The sense of any impending peril which requires a fundamental revision in our system of government, our theory of national life, is still unfelt. We do realize the need of a change in the theory of legislative power which shall give the lawmaker more freedom. Some of us are aroused to this need by problems of labor : the Lawrence strike, the McNamara and Haywood affairs ; some by problems of capital, by the trust investigations ; while the high cost of living has influenced the unthinking mass. The result is a desire to readjust the position of the courts in the general system of our government.

The recall of judges is only in small measure due to a desire to get rid of judges, but more largely to a desire to remind them by its crude potentialities of their duties to society as well as to the individual. The recall of decisions is brought forward as a more conservative and juster proposition having the same general end in view, as a plan under which due process of law in its final analysis is to be determined by the people who put the words in the constitution for the judges to follow and who put the judges in their places to interpret these words. Instead of attempting to terrorize the judge by

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the threat of personal punishment through the recall, instead of repealing the due process clause, instead of adopting amendments to our constitutions, necessarily broad and general, and conferring large and possibly dangerous powers on legislators in advance of legislation, it proposes to refer a specific law, with the objections of the courts to its constitutionality, to the people. Whatever the practical difficulties may be to its operation, its theory is not radical but conservative.

It proposes that the question whether a measure is due process of law shall be tested by the judgment of the legislature and the courts and, when they disagree, by the sober judgment of the people who created both. Ohio, in her constitutional convention, has submitted to the people with general approval the proposition that no law shall be declared unconstitutional unless five out of six of the judges of her supreme court concur.

Other proposals with like objects are made. The debates over them produce charges and countercharges. The forces of reaction, the perpetual minority, which in all ages has believed in the continuance of things as they are, the con-

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servatives who see, as they believe, the threatened destruction of the safeguards of freedom, the still larger class which believes that the American people are as yet only partially capable of self-government, find themselves arrayed in defense of a theory of judicial power which is out of harmony with the new programme of democracy.

This programme has for its initial purpose the more direct participation of the people in their own government and in the selection of their representatives, and a more direct sense of responsibility by those representatives to the people. Its first period is still one in which questions to be debated are largely matters of machinery. The direct primary, the presidential preference primary, the initiative, the referendum, the recall, the direct election of the United States Senators, are not ends of democracy, they are the means by which democracy seeks to express itself. How it shall express itself is another matter. The part of this programme which affects the courts is that which seeks to bring them in line with this movement by compelling them to recognize a shift in the balance of power, a necessary change in their relation to a system which must depend for its strength, its efficiency, and its growth upon the

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power to create and not on the power to complicate or prevent. The ark of the Constitution is not to be destroyed, nor the priests driven from the temple of justice. But the ark exists not for the priests or the Levites, but for an expanding nation. Its safe place is not in a temple, but in the hearts of a people whom it guides, protects, and serves.

III

Treadmill Justice

III

Treadmill Justice

IN a memorable summary of the progress in the administration of justice during the Victorian period, one of the most scholarly and learned of modern English judges, the late Lord Justice Bowen, speaking of the reforms effected in judicial procedure in England, and their result, said:—

In every case, whatever its character, every possible relief can be given with or without pleadings, with or without a formal trial, with or without discovery of documents or interrogatories, as the nature of the case prescribes—upon oral evidence or upon affidavits, as is most convenient. Every amendment can be made at all times and all stages, in any record, pleading, or proceeding, that is requisite for the purpose of deciding the real matter in controversy. *It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step, in his litigation. . . .* Law has ceased to be a scientific game that may be won or lost by playing some particular move.

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This proud affirmation of judicial progress which a distinguished jurist was able to make twenty years ago as to conditions in England, is in strong contrast to a statement made by ex-President Taft when, in the beginning of an address in New York on the "Delays and Defects in the Enforcement of Law in this Country," he said:—

If one were to be asked in what respect we had fallen furthest short of ideal conditions in our whole government, I think he would be justified in answering, in spite of the failure that we have made generally in municipal government, that the greatest reform which could be effected would be expedition and thoroughness in the enforcement of public and private rights in our courts. I do not mean to say that the judges of the courts are lacking either in honesty, industry, or knowledge of the law; but I do mean to say that the machinery of which they are a part is so cumbersome and slow and expensive for the litigants, public and private, that the whole judicial branch of the government fails in a marked way to accomplish certain of the purposes for which it was created.

The first impression of ex-President Taft's statement upon the average reader is that it is an exaggeration: that while no doubt there is need of reform in legal methods, nevertheless, to give to the reform of legal procedure such transcendent importance is to over-emphasize its relative value.

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But this first impression vanishes when we consider that but for the record — and that by no means perfect — of our poorest-paid judiciary, the judges of the federal courts, the ultimate failure of graft prosecutions and the punishment of rich men and dishonest corporations all over the country has been almost uniform; when we recall the humiliating collapses, elsewhere, of our criminal law, its demonstrated failure in so many cases to protect the public against crime by punishment of conspicuous public offenders; when we study, for example, the criminal law of Missouri and the frightful record of its inefficiency in the battle between the honest people of St. Louis and their plunderers; when we study the situation in San Francisco and see what bulwarks for crime could be found in California's higher courts, there can be no doubt that law reform is a vital issue in America to-day.

No one can read the reports of the transactions of the national and state bar associations in our country without being struck with the increase in law-reform propositions which are there found in the topics of discussion and in the subjects of papers read. The lawyers who conduct these discussions and prepare these papers, and

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appear in them as advocates of specific improvements in legal machinery, are, moreover, not the young and restless members of the bar, but the leaders of the profession, whose standing gives weight and authority to their advocacy.

In this movement there is no occasion for general attacks upon the judiciary. The yellow press, to which a technical judge and an eloping parson are objects of equal interest, can be relied upon to misrepresent the actual condition of our jurisprudence without assistance from sober-minded lawyers or laymen. Many of the defects in our law which require a remedy are judge-made, no doubt. But the idea that the judiciary is responsible, and solely responsible, for all our troubles in the bad workings of over-complicated law machinery is at once absurd and unjust. The courts of New York, for example, never devised that monster civil code, of nearly thirty-five hundred sections, which governs by set rules everything but the home life of the lawyers and judges, and prescribes with inflexible precision a myriad matters which demand neither inflexibility nor precision. The judges are not responsible for obscure and badly written statutes, the interpretation of which requires

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the full powers of clairvoyants, few of whom, it must be admitted, are upon the bench. When the legislatures lay down fixed rules in statutory enactments for judges to follow, it is not the fault of the judge if his oath of office compels him to follow where he is far more fit to lead. Where, for example, the statute law of a state requires the judge in his charge to the jury not to discuss the facts of the case, but merely to hand to the foreman some abstract statements of law for laymen to apply as best they may, it is no fault of the judge if the applications of the law made by the jury are at times bizarre in the extreme.

The spirit of law reform which is healthful, and which is likely to effect results, must be one whose motive is not the placing of blame upon some scapegoat, — jurist or legislator, — but rather the correction of defects in machinery, however occasioned, and the evolution of a better system of justice.

It is entirely logical and proper that in our desire to reform our methods of legal procedure, we should study the effect of law reform in England. The main impulse toward law reform there, beginning over seventy-five years

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ago, came from the observation by discontented English critics of the salutary effect of law reform in America, for we took the first great forward step in abolishing cumbrous and antiquated machinery and substituting more direct methods. It is only fair therefore, when we in turn are taking thought as to still further reforms and improvements here, that we should look to England and see what suggestions she may have for us, in return for those which we made and she profited by over half a century ago.

Dealing in this paper solely with the machinery of civil litigation, one fundamental difference between English and American methods which should be of interest to us is the relatively greater importance attached there to what may be called the stopping-point in litigation. By this is meant something more than speed in getting to trial and being heard. It is speed not only in getting into court, but also in getting out of court, which the English have admirably provided for in their judicial system. With us this last feature has as yet received little attention. It is because, in the writer's judgment, our indifference to the litigant's right to stop is a fundamental and far-reaching defect of Amer-

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ican judicial machinery, that this paper is written to discuss it, and some of its most obvious and important consequences.

Two questions which are asked every day in lawyers' offices all over the world are, how much it will cost, and how long it will take. It is of the highest practical importance, to both the lawyer and his client, that satisfactory answers be made to both of these queries. They can scarcely be answered separately. A lawsuit which takes years to dispose of is bound to cost, in proportion, more than one which can be speedily brought to a termination. The English system recognizes this, and has adequate facilities for termination of litigation by a final judgment. A case can be heard and decided in the High Court a month after it has begun; and if an appeal be taken, it can be heard and finally decided and ended in the Court of Appeal five months later. Only a tenth of the cases tried in England in the High Court are appealed at all, and of the appealed cases very few are ordered re-tried.

Compared with the great dispatch characteristic of English litigation, the interminableness of our own makes an extraordinary contrast. One prevalent cause of that interminableness is

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the unlimited and senseless scope of the right of appeal. In Illinois there are six kinds of frequently occurring cases in which the delays of reaching a *final* judgment are extraordinary. The case is tried and decided first in the County Court. An appeal can then be taken to the Circuit Court, where the witnesses again must be called and the whole case re-tried as though no previous trial had taken place, and in complete disregard of the proceedings and judgment of the County Court. The defeated party may then again appeal to the Appellate Court, where the case is heard on a printed record; and from that court, on a similar printed record, if still defeated, he may go to the Supreme Court of the state. In case there has been no error committed in the court below, the lawsuit, after having been decided four times, may come to an end in two and a half to three years after it was begun.

The folly of a system which permits a litigant to require a re-trial of the whole case, as though the first trial had never occurred, simply because the defeated party desires it, and without any proof whatever that any error or injustice was committed in the first trial, seems too patent for discussion. It is all the worse when this method

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of duplicate trials applies to the small claims of the poor for wages, and the like, and puts the poor litigant to the delay and expense of two trials before he can hope to get his rights. This is the case in Pennsylvania to-day. A claim under a hundred dollars goes to trial first before a magistrate. After his decision, the defeated party may appeal to the Court of Common Pleas, and the whole case then is re-tried as though the first trial never had taken place. The delay and expense of these trials are a burden on the honest creditor, and afford every possible opportunity for dishonesty and "beating" by debtors. By these re-trial methods, a solvent defendant who owes a hundred dollars or less in Philadelphia can put off payment if he wishes for two or three years.

Another and more general form of legal interminableness is of a different kind. It is caused by the re-trial of the same case over and over again, following reversals in appellate courts for "error," the effect of each reversal being to send the case back where it started, to be gone over again, the witnesses being reassembled in court and reëxamined as though no trial had ever been held.

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Over a year ago the writer listened to a lawyer arguing an appeal in the Appellate Division of the Supreme Court in New York. It was a very uninteresting lawsuit about the title to a small plot of land in the city. At the close of his argument, the lawyer said, "This case has been tried three times in the lower court by juries, has been heard on appeal in this court twice, and once in the Court of Appeals. The expenses of the litigation already have absorbed the value of this property in dispute. If there be some way which the court can find for deciding finally this dispute here in this court, without requiring it to be tried over again, it will be a blessing to all concerned."

This blessing the court found itself unable to confer, and six months later the case again was on the first round of the judicial ladder for a new trial in the lower court; and recently it has been once more decided in the Appellate Court, and is now on its weary way to the Court of Appeals. This is hardly an exceptional case. Interminableness in one form or another is a characteristic of our judicial method.

In one of the fairly recent volumes of the New York Court of Appeals Reports is con-

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tained the last chapter of a famous and extraordinary case, which is a gross illustration of this interminableness, and an extreme though characteristic example of its results. The court record of the last chapter of this lawsuit is curt and obscure ; hardly what one might expect for an extraordinary case. It consists of eight words : " Judgment and order affirmed with costs. No opinion." These eight words mark the close of a simple accident case involving no difficult questions of law, which had been in the courts continuously for twenty-two years ! It had been tried before juries seven times. It had been argued in appellate courts ten times. The final bill of costs in the case, *not including lawyers' charges* or the cost of printing seven different volumes of testimony, each of from two to three hundred pages, as required in the appellate courts on the various appeals, and not including any of defendant's expenses whatever, is over two thousand dollars. A conservative estimate of the expense of this litigation, *not including lawyers' fees*, probably would be five thousand dollars.

This lawsuit was one brought by a brakeman, named Ellis R. Williams, who had been employed by the Delaware, Lackawanna and

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Western Railroad Company, to recover damages from the railroad company for personal injuries. He had been injured, in July of 1882, by striking against a low bridge as he went under it on top of a box-car. His suit against the railroad company was brought in December of that year. It was tried for the first time, in 1884, before a jury in the Supreme Court at Utica, and he obtained a verdict against the railroad for four thousand dollars.

Now, there are two courts in New York to which a defeated party to a lawsuit can successfully appeal. First comes the General Term, now known as the Appellate Division, composed of judges of the Supreme Court. There are no juries in this court, and the case is heard on the briefs and arguments of the lawyers and on a printed record containing the testimony of the witnesses in the court below. The defeated party tries to show this court that either the judge or the jury was wrong in the lower court. If he fails to convince the first of these appeal courts, he may again appeal to the highest court of the state, the Court of Appeals. The full course of a jury case in New York, where the trial in the original court has been held in accordance with

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the established rules of law, is one trial and two appeals. If it has not been so held, one or the other of the appeal courts usually sends the case back for a new trial, sends it back where it began, where it is tried again before another jury as if it had never been tried before. The whole process is like a child trying to climb a toy ladder with three rungs. He begins on the first, balances himself, climbs from the first to the second, loses his balance, falls back. He picks himself up, climbs upon the first rung, then to the second, then to the third, and comes down with a thump on the floor again. When he gets to the third rung, *and stays there*, the lawsuit is over.

To give in detail the various trials, appeals, new trials, and new appeals, in Williams's case against the railroad company, which followed after the first verdict in his favor, would take more time and patience than any one but a well-fed lawyer would willingly give it. Condensing the story as much as possible, it is enough to say, that on the first appeal to the General Term, the railroad scored. Williams fell from the second rung of the ladder back to the floor. There had been a mistake in the way the case had been tried in the court below, and a new trial was or-

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dered. On the new jury trial, Williams succeeded again. Once more the railroad appealed to the General Term, and this time it was defeated. No new trial was ordered and the railroad accordingly took an appeal to the Court of Appeals.

This portion of the lawsuit, that is, up to the time when Williams first arrived at the third rung of the law ladder, the Court of Appeals, occupied seven years, so that the case even then was a fairly old one; and it would seem that, if there were some way in which a seven-year-old lawsuit could finally be determined by the court and stopped, it would be a good thing for both parties. The court was in an excellent position to render such a final judgment. The record which it had before it, when this appeal was heard, contained all the testimony which either party thought was material to the dispute, and everything which had occurred at the trial. Among other things, it showed that at the end of the case, after all these witnesses had been examined and both sides were through with their testimony, the railroad lawyer had asked the judge to dismiss the case without sending it to the jury, claiming that, even accepting Williams's own

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story as true, he had no legal claim against the railroad company. The Court of Appeals, after listening to the lawyers and examining the printed testimony, decided that the railroad lawyer was right and the judge should have dismissed the case.

It reached this conclusion from reading Williams's own testimony. He admitted that he had been under the bridge many times on the top of box-cars, and knew that it was a low bridge and dangerous; yet he had turned his back to it as the car went under it on the day of the accident, and had been struck while thus walking toward the rear of the car. In view of this testimony of Williams himself, the Court of Appeals was of the opinion that the judge who presided at the jury trial had been wrong in not dismissing the case.

Now, to the mind of an ordinary business man, it would seem as if this was the logical place for this lawsuit to stop. It would seem as if there was only one thing now left to be done, and that was, by some appropriate judicial red tape, to end the case in the railroad's favor. The Court of Appeals in New York is empowered, as the highest courts in other states generally are, "to grant

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to either party such judgment as such party may be entitled to." But instead of stopping a lawsuit which then had been in the courts continuously for seven years, and on the full merits of which it had just decided, it started the wheels of litigation over again. It granted a new trial.

Now, Williams had been badly hurt, and his injuries were such as to appeal to a jury. During the seven years of this litigation he had twice had verdicts of sums which must have seemed large to him, and he probably had built many hopes on receiving the money the jury had awarded him. All these hopes were now destroyed. The Court of Appeals had decided, substantially *on his own story* as he had told it to the jury, that he was not entitled to damages from the railroad company.

It is not in human nature to accept tamely and humbly such a killing decree without an effort to escape it. It is not in human nature for a man who has been for seven years fighting in the courts a hotly contested lawsuit, which has twice been decided in his favor, to acquiesce without a struggle in a decree against him. Williams had been defeated in the Court of Appeals solely by his own testimony. If he was to succeed on a

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new trial, there was one thing, and only one thing, which he could do. He did that thing. On the new trial *he completely changed his testimony as to all those matters on which the Court of Appeals had based its judgment against him.*

It is unnecessary for the purposes of this article to follow in detail the subsequent history of this lawsuit. Suffice it to say that, after eleven years more of litigation, the plaintiff actually succeeded, by thus changing his testimony, in getting sixty-five hundred dollars of railroad money on the *seventh* new trial of his suit. The Court of Appeals acquiesced in 1904 in a verdict for that amount, twenty-two years after the commencement of the action and fourteen since that court had decided that Williams had no case and should have been put out of court.

The lesson of this extraordinary case is plain, and it is the importance of that lesson which is the writer's excuse for so long a consideration of it. A system of law which has not adequate terminal facilities must be judged by its results, and one of them is the creation of unnecessary temptations to perjury. The court which created that temptation in Williams's case has itself declared :—

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It *frequently* happens that cases appear and reappear in this court, after three or four trials, where the plaintiff on every trial has changed his testimony in order to meet the varying fortunes of the case upon appeal.

In every state where a similar system prevails, — and there are many of them, — the Williams case can be duplicated. For human nature is the same in one state as in another, and the temptation to which Williams was exposed is the temptation of every litigant in a law case in which an unnecessary new trial is ordered by a court which is itself in a position, with all the facts before it, to render a just and final judgment.

The disadvantages to justice herself of the treadmill system are equaled only by those to the litigant. A grimly humorous illustration of one of the results to the litigant may be found in another New York lawsuit which reached a final chapter recently in the Court of Appeals. It was a complex case against an insurance company on some policies of insurance, and each time it was tried it took from a week to two weeks' attention of court and jury. Owing to reversals and new trials ordered by appellate courts, it had to be tried nine times. It was in the courts from 1882 to 1902. The plaintiff

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became at last so sick and disheartened with his interminable lawsuit that he abandoned it, refused to go to his lawyers to consult with them about it or to appear when the case was being tried. The lawyers had themselves spent over forty-five hundred dollars on fighting the case, and had worked on it for nearly twenty years. Their client having abandoned them, they settled the case for thirty thousand dollars, and took the money themselves for their fees. The last chapter of the litigation was an unsuccessful attempt by the receiver in insolvency of the plaintiff to make the lawyers give up some of their fees to their client's creditors. How much the twenty years' delay in the lawsuit had to do with that insolvency it is impossible to say; but such an outcome, to the lay mind, seems hardly satisfactory as a result of twenty years of litigation, of nine trials, and seventy-two days' time of over a hundred jurors.

While these illustrations have been taken from the New York courts, this has been done merely for convenience, and not because the Marathon method, of the results of which they are extreme examples, is peculiar to that state. The courts of New York, through the learning and

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ability of their judges, have stood for a century at the very front of the American judiciary. The disregard of the litigants' right to stop is not confined to one state or section, but it is, with few exceptions, a general and characteristic defect in American justice. It exists through the courts, even when the legislatures have provided adequate means for the termination of litigation. In Pennsylvania, for example, there was adopted some fifteen years ago a statute giving its appeal courts power to enter such judgment as would do substantial justice without sending the case back to the original court. One of the leaders of the Philadelphia Bar testified, before the Law's Delay Committee in New York, that during twelve years in which the statute had then been in effect, the Supreme Court had exercised the power given by the statute only once.

There is not a recent volume of either the intermediate or highest of the New York appeal courts which does not contain some case which has been tried over again three or four times in the lower court, through successive re-trials ordered by higher courts on appeals taken. Such decisions cannot be duplicated in English jus-

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tice. There the endless re-trial of the same case for "error" is neither required nor permitted. The fundamental importance, from practical considerations, of a system of justice with "terminal facilities," is recognized there, but not here.

Now, this difference in point of view is important not only in itself, but in its necessary consequences. It is entirely logical that a judicial organization which does not consider the stopping-point of a lawsuit as at all important should be technical in procedure, and filled with pitfalls, delays, and interminable re-trials, and an extraordinary over-development of higher courts and appeal machinery. It is equally logical that a system which does consider the stopping-point of the lawsuit as practically important should be one in which technicalities of procedure are absent, where new trials are ordered rarely and only for extraordinary reasons, and where the great strength of the system is expressed, not only nominally but actually, in its trial courts, the courts where the whole dispute is first heard and decided.

It is because of this fundamental difference in point of view that we have developed top-heavy appellate courts, with unlimited rights of appeal

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to them for delay as well as for justice. It is through the disregard of a stopping-point as a fundamental requisite of substantial justice that the appellate courts develop technical "error" and order new trials for trifles, till the difficulties of getting justice in the court of first instance are almost insuperable.

In England everything is done which can be done to make the first trial a conquest of substantial justice. In the court-room the judge has free play. He is fettered with no technical rules. He turns promptly out of court cases too flimsy to deserve the consideration of court and jury. He expresses his opinion on the facts freely. He is the keystone of the judicial arch. He has none of the terrors of reversal hanging over him for any technical error he may make, because the English law binding upon the appeal courts expressly provides : —

A new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial.

He is endowed with such judicial power because he is a part of a system which *expects* justice to

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be rendered at first hand in his court, and which considers speed in reaching a final judgment essential to its usefulness. The judge who in the first instance sees and hears the parties and their witnesses, who hears the case while it is a living thing, is there considered at his actual importance. A system which reduces his importance, which fetters him with rules so technical as to tend to make him afraid of his shadow in his own court, which deprives him of influence with his juries, which forbids him to dismiss cases too flimsy for judicial consideration, is and must be a system which does not expect justice to be rendered in the first court, but in some appellate court, or rather in some lower court after some appellate court has decided wherein the first lower court has failed to meet the full requirements of the law. The over-development of appeal courts in America is largely due to this spirit.

The effect of the over-development and misdevelopment of appellate courts upon civil justice can be better explained perhaps by an illustration. The illustration chosen is taken from the history of a somewhat famous accident case in New York, which was tried over three or four

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times by juries, and was passed on twice by the Appellate Division of the Supreme Court and once by the Court of Appeals. The plaintiff was a widow suing for the death of her son, who was killed by a street-car. She had a verdict each time from the jury. The appellate courts were inclined to consider the plaintiff's case weak, and that the justice of the verdict was doubtful. The first time the case was tried, the judge thought the evidence was so meagre as to require a dismissal, and dismissed the case. When, on the appeal taken by the widow, the case first reached the Court of Appeals, that court established what was in effect a new rule for all such cases, and declared that however flimsy the plaintiff's testimony was, if it was such that if it were uncontradicted it would justify a verdict, the case must go to the jury, even if the evidence produced by the defendant was overwhelmingly greater and showed clearly that there was no justice in a recovery by plaintiff. On the re-trial ordered by the Court of Appeals the plaintiff had a verdict, and the case again went up on appeal taken by the railroad. The Appellate Court once more reversed it. The ruling it made was this. The trial judge had

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attempted to tell the jury how much care the little boy who was killed was bound to use in crossing the street where the cars ran, and had said that he was bound to use the care which a boy of his tender years would use in the same situation, and "would deem adequate thereto." The Appellate Court reversed because the trial judge had used the words quoted. They were held to be erroneous, and were assumed so to have influenced and misled the jury that they had brought in a bad verdict. Now, of course, the jury was not misled at all by this ruling, and a reversal on this ground was absurd. The situation, however, is quite clear. The Appellate Court, as a matter of fact, was influenced in reversing the verdict, not by the "error," but by the apparent injustice of the verdict itself. It placed its decision upon a highly technical ground because it found no other legal ground for setting aside the verdict.

But by this and a multitude of similar decisions it has rendered accident law, which in view of the nature of these cases ought to be fairly simple, a complicated and highly technical branch of legal art, and has multiplied enormously the difficulties of trial judges in managing these

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cases. Now, it may be that in this particular case it was proper to prevent the widow from recovering the verdict which had been awarded to her. There was some benefit to the defendant by this ruling, because the record shows that on the next trial she got a smaller verdict, so that the four erroneous words quoted cost her nine hundred and sixty dollars each. The question in its broader aspect, however, is whether the decision of the Appellate Court and others like it are worth what they cost. In other words, whether it is a good policy to make the general accident law, for example, so technical and difficult and filled with so many possibilities of legal error, that the trial judge is constantly nervous in trying to avoid making mistakes, and has his mind occupied with these technical rules rather than with the real merits of the case he is trying.

An old business man who for a quarter of a century has managed, with distinguished success, a corporation maintaining many departments, once said to the writer, "There is at least one demonstratedly wrong way to run a business corporation. That wrong way is to make every department chief feel that there is not a dot or cross that he makes or a minor rule that he lays

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down, however unimportant, which is not likely to be changed in the president's office a day or so later. The surest way to spoil a good department manager is to make him think that the actual management of his department, not in general outlines only but in detail as well, is to be done in the president's office and not in his own." There is more efficiency lost to a big business by a top-heavy president's office, than in any other way. It can hardly be doubted that a top-heavy judicial system loses its efficiency in the same way. If the judge who presides at the trial of a case, who listens to the witnesses as the attorneys question them, is made to feel that the detail of his work, as well as its general principles, is to be reëxamined and revised somewhere else, the judge, like the business manager, loses not only a certain freedom necessary for his full efficiency, but a proper sense of responsibility as well. Technical decisions which multiply the uncertainty and delays of the law are the last thing that people want. Delays, uncertainties, new trials, and the absence of terminal facilities, are not aids to justice, but unwholesome substitutes for it.

There is a well-known historical objection to

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this method of trying to avoid injustice by multiplying technicalities. The technicalities of criminal law which mightily disgust the people to-day, and result so often in the escape of offenders justly convicted, had their historical origin in the efforts of English judges a century and more ago to avoid rendering judgments of death and outlawry for minor offenses, — sentences which a barbarous criminal law then required the judges to render. To avoid one evil they industriously created another. Because the criminal law was barbarous, they made it almost ludicrously technical. We inherited the technicalities and made them part of our more humane criminal law, and it is an inheritance which has been, and to a large extent continues to be, a stumbling-block to justice and a shield for guilt. The development of technical law as a means of avoiding possible injustice in individual cases is a demonstrated failure.

One of the most serious results of a meddling over-control of trial judges by appellate courts, and their system of deferring final judgment by interminable re-trials directed over and over again on technical grounds, is the breaking down of the jury system. The number of cases

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increases perceptibly in which the judges of appellate courts set aside verdicts and order new trials, because they are convinced that the juries have brought in unjust verdicts. The theory of our law has always been that the jury is to pass upon disputed questions of fact, deciding which of the opposing witnesses is to be believed, but that the courts have the right to set aside verdicts when they are so contrary to the clear weight of the evidence as to show bias, prejudice, or passion, on the part of the jury. Why are the courts interfering so much more frequently than they formerly did with jury verdicts? Are the jurors of a lower order of intelligence than they were seventy-five years ago? Is the modern juror less just, more prone to passion and prejudice, and less open to reason? Any such deterioration in the quality of a juror will hardly be claimed.

There is another explanation which deserves more consideration than it has received. It is that the appellate courts are tacitly confessing that their method of managing trial judges is, in an increasing number of cases, working substantial injustice. It is an example of the effect of the lack of terminal facilities of our law upon

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the quality of the law. Under a system in which new trials are granted by appellate courts for trifling technical reasons, the conscientious judge at the jury trial must be doubly anxious to avoid these possible "errors" which will result in the miscarriage of justice by a new trial granted in an upper court. A trial judge whose mind is focused on the avoidance of legal "error," whose charge is a desperate effort for correctness rather than clearness, is bound to lose his influence with the jury in handling the broad lines of the case. Charging a jury used to be considered a fine art, one requiring the highest type of judicial mind in marshaling the facts of a complicated case so as to make clear the bearings of the law upon them, to show the jurors the issues, the point which it is their province to decide. The average juror respects the judge, is sensitive to his opinion, is anxious to follow his rulings and to do justice according to law, provided, and always provided, he can understand what the judge is talking about. When the charge to which the jury listens is one third vague platitudes and two thirds undigested extracts from the opinions of the appellate courts laboriously collated by the opposing lawyers and charged by request,

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couched in legal phraseology which a lawyer would have to read twice to understand, and which a jury is supposed to understand by intuition, the authority of the trial judge over the bewildered jury is gone, and the verdict which some appellate court reverses later is a reflection upon that court, a commentary on the results of its own methods far more than upon the jury system.

The weak spot in the American judicial system is in the so-called lower courts. This is true because the public has an exaggerated opinion of the importance of those tribunals where the judges sit in robes and austere dignity, and uphold the constitution, and write long and learned opinions which are printed in law books and sometimes published in newspapers. It is the weak spot because, through an indifference generated by this mistaken opinion, the public so often permits the election to the lower ranks of the judiciary of political henchmen and semi-incompetents, in the complacent belief, shared by many lawyers, that all will be well so long as these dignified upper courts remain to right, at least temporarily, the wrongs of the man with a purse long enough to get there. It is the weak

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spot because the appellate courts, in a meddling over-development of their own functions, tend to hamper and confuse the trial judge in his work by multiplying technical trifles to govern his conduct.

The undue subordination of the trial judge lies at the basis of the interminableness of litigation. The complaint is made often that commercial litigation has largely disappeared from our courts. Why should there be any? If simple accident cases, through technical slips and procedure, can be ordered re-tried three or four times, what chance have complicated commercial causes, involving difficult questions of law or fact, of reaching final termination with anything like promptness? Commercial litigation will not return to the courts solely by shortening the delay in getting to trial. The business man wants to know when he is likely to get out of court, and lacking any reasonable assurances on that score will settle his grievances or charge them up to profit and loss.

Interminableness is the great defect of civil justice in America. It is a defect which must be removed if the courts are to perform their proper functions. Justice at first hand is what

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the honest litigant wants. It is the only kind many suitors can afford. The causes which make our first-hand justice uncertain or ineffectual must be removed. The right of appeal must cease to be the means of denying and delaying justice. Complicated and inflexible codes of procedure must be made simple. The old Latin maxim which Blackstone knew, and which modern American law has forgotten, must be again recognized and its validity restored: *Interest rei publicæ ut sit finis litium*. (It is to the advantage of the state that there should be an end to litigation.)¹

¹ Since this paper was first published a great change has been made in the status of treadmill justice in New York, by amendments to the Code of Civil Procedure made in 1912, prepared and advocated by the Bar Association of the City of New York, and among the many recent praiseworthy accomplishments of its Committee on Law Reform. The effect of these amendments, as stated, by Judge Laughlin in a recent decision of the Appellate Division of the Supreme Court (*Bonnette v. Molloy*, November, 1912), is this: "The Appellate Division has now been vested with authority to grant *the final judgment which, in its opinion, should have been granted by the trial court*, not only in all equity cases, but in all actions tried before the court without a jury, and in jury causes as well, where the evidence was insufficient to require the submission of the case to the jury." The immense value of this change in the law is apparent. In classes of litigation which include not only a multitude of flimsy speculative damage suits but those cases which involve the most difficult questions of law and the largest money interests, there is at last a definite and readily attainable stopping-point.

IV

The State as Employer

IV

The State as Employer

THE question of what should be the relation of the State as employer to its employees is not merely an abstract question of law, but is much more one of applied ethics. With the enlarged conceptions of the functions of the State now steadily developing, and with the enormous expenditures which are being made annually upon so-called public works involving the direct or indirect employment of thousands of workmen, the determination of this question of ethics becomes more urgent and important. Shall the State recognize as its duty that obligation which every high-minded employer recognizes of treating employees fairly, paying them a proper wage, and requiring from them only reasonable hours of service, or shall it repudiate all moral obligation, and upon a basis of commercialism consent that the longest hours and the lowest wage shall be imposed which the market of men affords? We see these two questions daily asked and an-

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swered by employers in the business world, the closest parallel to the State as employer being those private corporations whose officers must decide whether, in justice to their stockholders, they owe any moral obligation to pay employees more than the lowest market rate, or whether the stockholders are not entitled as dividends to the sums wrung by the stern law of supply and demand from the necessities of the men who earn them.

New York decided some years ago the position which its citizens thought the State should take as an employer of labor. The legislature, representing the people, decided that the State should not only itself pay fair wages for fair hours, but should insist that its work done by its contractors should be performed on similar terms. A statute was enacted in 1897 expressing that principle, one provision of which was that eight hours should constitute a legal day's work for all employees on public work, and another, that the wages to be paid upon public work should not be less than the prevailing rate for a day's work in the same trade in the locality where such public work is performed. The law required each contract for public work to contain a stipulation to the effect

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that each workman employed by the contractor or subcontractor should be employed such hours and receive such wages. This statute decided in effect that the State had an interest in the way employees were paid, who built its public works, and the length of hours in which they labored; that in the same way in which a citizen might refuse to wear garments made under sweat-shop conditions, the State itself might refuse to have its public works done by contractors utilizing the padrone system and refusing to pay their workmen what justice requires.

The entire moral principle underlying this legislation was, however, repudiated, so far as contractors on public work are concerned, by two decisions of New York's highest court and the right of the State itself to regulate the wage terms of contractors with it denied.

The first portion of this statute to be attacked was the one relating to wages. A contractor having obtained a contract in which he agreed to these wage conditions required by the State, and having undoubtedly obtained a larger contract price than he would have obtained if this provision had not been part of the bargain, deliberately violated his contract, and the Comptroller of

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New York City having refused, on account of this violation, to pay him the balance claimed upon the contract, he brought action to compel such payment, claiming that the so-called Prevailing Rate of Wages Law was unconstitutional, and that he was not bound to comply with his contract so far as it provided for the wage payment of his employees. The highest court in New York, by a divided court, sustained his contention. It held this Prevailing Rate of Wages Law to be in violation of the State constitution, "because it permits and requires the expenditure of the money of the city or that of the local property owner for other than city purposes," the reasoning of the court on this proposition being in effect that anything above the lowest market rate is in effect a gratuity. A further ground for holding the wage law invalid was found in the fact that it prevented the city and the contractor from agreeing with their employees upon the measure of their compensation.

This decision (*People ex rel. Rogers v. Coler*, 166 N. Y.) in effect held that the right to obtain labor at the lowest possible rate is an inalienable right and duty of the State and its cities, and that legislation which requires on

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public work the payment by contractors of a prevailing or ordinary rate of wages (not, it is to be observed, *more* than the usual wages current among workmen of a given class) is beyond the power of the legislature. The Chief Justice of the Court, Judge Parker, dissented from the prevailing judgment of the Court, and said :—

The legislature, which is vested with the power to direct the conduct of the business operations of the State by this statute, has not only declared it to be the policy of the State, as a proprietor, to pay the prevailing rate of wages, but has enjoined upon its several agents and agencies the duty of executing this policy. An attack upon this statute, therefore, assails the right of the State, as a proprietor, to pay such wages as it chooses to those who either work for it directly or upon any work of construction upon which it may be engaged.

The decision of the majority of the Court, he described as a “judicial encroachment upon legislative prerogative.” He says upon the question of public ethics involved in this case :—

It would seem to follow that the position taken by the State in enacting this statute was precisely like that of an individual who for any reason determines that if it would be a little more honest, as that term is usually applied, it is not more than just to pay for a thing what it is fairly worth, and that the principle

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should be applied as well to the compensation of labor as to the payment for material.

The balance of the statute, the portion of it which prescribes the hours of work and prohibits a contractor with a State or a city from requiring more than eight hours a day for labor on public work, was shortly afterwards (*People v. Orange County Construction Company*, 175 N. Y. 84) also held by the highest New York court to be unconstitutional as violating the Constitution of the United States.

This construction company had been indicted for requiring more than eight hours' work from its employees in the performance by it of a contract for the improvement of a public highway, a violation of this provision of the labor law being a misdemeanor. The Court held that this statute, prohibiting a contractor with the State or a municipal corporation from requiring more than eight hours' work for a day's labor, had no relation to the public health, morals, or order, and cannot be upheld as a valid and constitutional exercise of the police power vested in the legislature ; and as it applied only to contracts with the State or municipality, it created an arbitrary distinction between persons con-

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tracting with the State or a municipality and other employers of labor, thus violating the provision of the Federal Constitution forbidding any State to "deny to any person within its jurisdiction the equal protection of its laws."

Under these two decisions the entire policy of the people of New York, as indicated in this statute, was apparently nullified. The Court of Appeals practically held that on the highly important question of the business morals of the State itself the people were precluded from reaching a determination which they thought was just.

These cases illustrate a phase of the conflict between the legislatures and the courts over the power of the law to affect the wage scale. This assertion of the power of the State as employer to do justice and to deal fairly with its own workmen, or to insist upon fair dealing between the contractors and their own employees when engaged upon public work, is a declaration of legislative authority on the subject in its most defensible form.

The apparent solicitude of the courts to maintain the constitutional right of the industrially helpless to remain helpless, by preserving to em-

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ployees engaged not in public but in private employment their liberty and freedom of contract, has been illustrated time and again. Kansas, for example, by her highest court, indignantly declared that a law requiring wages to be paid in cash "places the laborer under guardianship, classifying him in respect to freedom of contract together with the idiot, the lunatic, or a felon in a penitentiary. It is an encroachment on his constitutional rights and an obstruction to his pursuit of happiness." Pennsylvania has declared a law, requiring the wages of labor in steel mills to be paid at regular intervals and in lawful money, to be unconstitutional as preventing people from making their own contracts. In broad terms its highest court has declared that "the laborer may sell his labor for what he thinks best, whether in money or goods, just as his employer may sell his iron or coal, and any and every law which proposes to prevent him from doing so, is an infringement of his constitutional privileges, and consequently vicious and void." Missouri has held that a law prohibiting mining and manufacturing companies from issuing store orders on the company's stores or otherwise than in lawful money, unless

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the order is otherwise redeemable without discount in cash, is void as depriving the employee of his liberty without due process of law. In these decisions the highest courts of Mississippi, Texas, California, and Illinois are in accord.¹

¹ An interesting side light upon the practical effect of these decisions is given by a writer in a recent number of the *Atlantic* ("The Æsthetic Value of Efficiency," by Ethel Puffer Howes, *Atlantic Monthly*, July, 1912). In these several States the legislatures, recognizing the condition of industrial bondage from which certain classes of their citizens were suffering, sought to terminate that bondage by appropriate laws, which the courts had, however, held void as interferences with the theoretical and abstract liberty of those whose actual liberty the legislatures had sought to restore. In the article referred to, the writer describes the conduct of a very large lumber company operating in one of these States (Mississippi), whose broad-minded operators had chosen to do *voluntarily* what its competitors could not be obliged to do, in the fair and decent treatment of the "lumber-jacks." She says : —

"The real great secret of the recklessness and irresponsibility of the lumber crew was their financial bondage. In all lumber-camps and sawmill towns the men were compelled to trade at the company store, and were paid only by being allowed to draw their balance over this store account once a month. And as in the towns, the prices at the commissary or company store were highly exorbitant, and the workmen were always tempted to run up large accounts. In fact, practically all the lumber companies that made any profit at all, *made it out of their stores*, — 'operating on a commissary basis,' as it is called, — with results to the workmen that may be imagined. To change this custom was by other lumbermen looked on as suicidal.

"But the Vateria Company began at once the payment of its workmen once a week in cash. It is hard to make clear the miracle that this one simple fact works, and has worked here, in the

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Massachusetts is now experimenting with a minimum wage law, which it has adopted after a prolonged study of the economic conditions of the working-people, and more particularly after the disclosures made by the recent strike in Lawrence. Those to whom this attempt at legislation seems weak, tentative, and certain to be ineffective must consider the character and extent of judicial hostility with which this law is handicapped in advance, a hostility which is as yet a stumbling-block in the way of industrial legislation, such as is ancient history in all other highly organized nations of the world.

conduct of a man's life, and in his moral attitude. It might be said that this is a commonplace business method, a matter of course. Unfortunately it was, and is, so little a matter of course in the South that the country's whole economic condition would have been changed, if fifteen years ago the credit system could have been swept away everywhere and cash payments inaugurated. A large number of immigrants brought with great hopes to South Carolina in 1906, left there within a year largely because they were not paid in cash and had to trade at the company store. And to-day, still, the camp, mine, and plantation hands, the tenant farmers and the small freehold farmers, are nearly all fast-bound, each under the special conditions of his calling, in this cruel system of indefinite credits and inordinate payments."

Yet these decisions declare that the doing of this simple "miracle" is beyond the power of the legislature and that to restore to these humble workers what the writer justly declares as "the first condition of self-controlled living" is to deprive them of "liberty of contract" or their employers of the "equal protection" of the law.

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As to many of these so-called interferences by legislation under which the wage scale or the methods of its payment are attempted to be regulated by law, there is doubtless room for honest difference of opinion as to the practical wisdom and policy of a rule proposed. What we have to consider is not a question of wisdom or policy, but a question of power. The New York courts and other courts in other States which have followed the principle of its decisions have in effect declared that not only has the State no power to interfere with the wage scales of private employment, or the manner or method or time of payment of wages, but that it has no right to adopt an ethical standard for its own policy as employer. The people, having created in the State a constitution, and having therein provided for a legislature with general power to enact laws expressing the will of the State, the courts say, in effect, that the legislature is powerless to express a policy of common fair dealing on this subject as to public work done for or by the State, unless in express set terms the people amend that constitution and provide for something which the courts say may not be implied, namely, a decent ethical standard of the State as employer.

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How hard is the process by which this standard is attained may be seen by the subsequent course of events in New York. The first case on the public wage law was decided in 1901, the second as to the hours of labor was decided in 1903. Shortly after New York had declared in both phases the statute to be unconstitutional, the United States Supreme Court reached a contrary conclusion on a similar law and handed down one of the most important decisions yet rendered in this country on law in its relation to labor. The case in which this decision was rendered arose out of a Kansas statute enacted in 1891, by which a rule of conduct had been adopted by that State practically identical with that of New York. The statute differs from the New York statute in its wording, but is identical in its principle, both as to the hours and the wages to be paid employees. This statute provides for an eight-hour day for all laborers employed by or on behalf of the State or by any county or city, except in cases of extraordinary emergency, etc. It provides further that all public contracts shall be deemed to be made on the basis of eight hours, and that it shall be unlawful for any corporation, etc., to require or permit any workman to work more than eight

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hours per calendar day, except in cases of extraordinary emergency, and that "any officer of the State or any contractor with the State violating the statute shall be punishable by a fine of not less than \$50, etc., or by imprisonment."

In this case a contractor named Atkin, who had entered into a contract with the Mayor of Kansas City for the opening of public streets, hired one Reese, a common laborer, to work for him in laying pavement. Reese was required to work more than eight hours a day. Atkin, his employer, was for this convicted of a violation of this law, and he appealed to the Supreme Court of the State. The law had been previously considered by that court and held to be constitutional (*In re Dalton*, 61 Kansas, 257), and following that decision his conviction was affirmed, and he appealed to the Supreme Court of the United States.

It is obvious from a very cursory examination that the decision of the Kansas Court involves the same principle as the New York Eight-Hour Law case, cited above (*People v. Orange County Construction Company*), and reaches a precisely contrary conclusion. The Supreme Court of the United States held the Kansas decision to be

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correct, and in effect reversed the New York Court of Appeals so far as that case held the New York Eight-Hour Law for public work to be a violation of the Federal Constitution. The Supreme Court does not even indulge in a doubt as to the constitutionality of this Kansas statute. "Indeed, its constitutionality is," it declares, "beyond all question." On the principle of the right of the State to act as a model employer unaffected by constitutional limitations, the Supreme Court says:—

Whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work for it or for one of its municipal agencies should permit or require an employee to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. *It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt without regard to the wishes of the State. On the contrary, it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions in which it will permit public work to be done on its behalf or on behalf of its municipalities.* No court has authority to review its action in that respect.

This decision is an authoritative finding that, so

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far as the Constitution of the United States is concerned, the States have full power to pass statutes providing the terms and conditions under which public work may be done as to the hours of labor which shall be expected of employees performing such work. The decision is important because heretofore hour legislation has been upheld solely on the ground of the interest of the State in the public health, and as an appropriate exercise of police power. The well-known Utah Eight-Hour Law was sustained by the United States Supreme Court solely on this ground.

The decision of the Supreme Court is based not at all upon any police power of the State, but upon an affirmation of the State's right as employer to determine what terms and conditions of labor are just on work done on its behalf, and on its further right to insist that those terms be carried out even by punishing criminally those who violate them. The decision is important further because similar statutory regulations of the hours and conditions of labor exist in many States, and the decision has been a powerful argument for sustaining them before local courts. Statutes in principle similar to the New York

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and Kansas statutes, and covering either State employment alone or employment by the State and its contractors, exist, for example, in Massachusetts, Colorado, Idaho, Wyoming, Utah, Texas, Washington, Porto Rico, Tennessee, West Virginia, and Maryland, and have been enacted covering direct governmental employment only by the Federal Government.

In England, since 1891, a resolution of the House of Commons, the so-called Buxton Rule, provides that *in all Government contracts* it was the duty of the Government "to make every effort to secure the payment of the rate of wages generally accepted as current for the competent workman in his trade."

Singularly enough, the first State to be influenced by the Atkin Case was New York. A few months after the Supreme Court had rendered its decision, the Court of Appeals, in *Ryan v. City of New York*, 177 N. Y. 271, by a close vote of four to three, modified its previous determination that the Prevailing Rate of Wages Law was unconstitutional. It now upholds that law, so far as it applies to the workmen directly employed by the State or its cities. The earlier case had been one in which

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the wages in question were those of employees of contractors. In this decision it now declares that the legislature may lawfully provide that the State and its cities shall pay fair wages (not less than the prevailing rate) to its own employees, but if public work is done, not by direct public employment, but through agents and contractors, the legislature has no power to prescribe what wages these agents shall pay who voluntarily contract to do public work. In other words, if a city does its own public work by direct employment, it must pay the prevailing rate of wages to its employees. *If it, however, does the same work through contractors,* it must not and cannot require the contractors to pay similar wages. By similar reasoning, some months later, in another decision, it again found to be unconstitutional the Hour Law on public work not done by the city itself, but by its contractors. The United States Supreme Court having held that the Federal Constitution does not forbid such legislation for fair hours for employees on public work, the New York Court was forced to change the basis of its former decision against the Hour Law from the Federal Constitution to the Constitution of

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the State; and its conclusion that the Hour Law on public contract work is unconstitutional is in this later decision founded upon an extraordinary and novel right which it says the towns and cities have under the State Constitution as against the State which creates them (and which, if it chooses, can destroy them) — the right to have their contract work done in the very cheapest market. The New York judges disagree in their reasoning in this as in most of the labor-law cases which they have decided, but they agree on at least one conclusion: "Where the municipality lets work by contract, it is itself interested only in the result obtained, and if that result complies with the requirements of the contract, it is immaterial to the State what the contractors' employees may have been paid or how long they may have worked." As expressed in another of the opinions written in this case: "It was not of the slightest consequence to the city whether he (the contractor) permitted his workmen to labor eight hours or nine, so long as he produced and delivered the property that he agreed to deliver."

The courts having thus concluded for them-

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selves what the policy of the State as employer should be in a manner contrary to the decision of the legislature, all that could be done by those who did not believe that these quotations fairly represented the prevailing sentiment of the people was to procure a constitutional amendment. This process took four years. Then the old law which had been declared unconstitutional was promptly reenacted by the legislature. Another year elapsed before this new law took effect. Still the legal status of the State as employer was not settled. A contractor, after the reenactment of the wage law, willfully disregarded both its provisions as to wages and as to hours. Upon demanding pay for his work, the Comptroller of New York City, as expressly required by the statute itself, refused payment on the ground that this law had been violated. The contractor promptly obtained a summary order from the Supreme Court directing the Comptroller to pay his bill, notwithstanding the conceded violation of the statute. The intermediate Appeal Court sustained the ruling without writing an opinion, which should show the reasoning by which they justified their conclusion. The highest

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court of the State reluctantly reversed these decisions and sustained the law, declaring, "We uphold the statute simply because the people have so amended the Constitution as to permit such legislation."

This dull story represents eleven years of conflict between the courts and the legislature. It represents it only in one State. Economic changes do not always come so slowly. If it requires, in a great enlightened and rich commonwealth, eleven years so far to overcome judicial resistance as to lay the foundation for the very beginning of a policy of fair dealing between the State as employer and those who do its work, the question arises as to whether the complicated machinery of constitutional checks and balances will move more speedily in matters of graver import, problems more complicated, where wise men differ in judgment as to the policy of the State, where fore-knowledge being impossible, experimental legislation is necessary. These questions arouse in the mind of the thoughtful observer misgivings which in a measure tend to resolve themselves in the realization that there is in our country, as in all countries, a principle which underlies,

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permeates, and ultimately dominates all forms of democratic government, the principle which the conflict here described fairly illustrates, that there is and can be no permanent triumph of any abstract theory of government over the soberly formulated will of the governed; that to endure, the theory must itself develop, expand, and be perpetually vitalized under the test, not of academic logic or barren law, but the social and industrial demands of the people whose effectual service is its only reason for being.

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American Discontent with
Criminal Law

V

American Discontent with Criminal Law

THE English people a century ago took into their hands as a public matter the condition of the Court of Chancery — the “ Court of Fraud and Delay,” as Sydney Smith called it. In the same spirit we are taking up the conditions of our criminal law, studying the causes of its defects, and looking for remedies which shall give it a much-needed efficiency. Some of these causes of the failure of our criminal law are quite outside the black letters of the law-book, and cannot be cured by mere legislative enactments or by the decisions of courts.

Of these causes perhaps the principal one is a certain defect in the American temperament, in its lack of respect for law as law. It is a defect which for generations has afforded aid and comfort to persons accused of crime. It is a defect which prosecuting officials recognize and fear. It is an attitude towards law which the newly arrived foreigner quickly learns to con-

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sider as part of our system of government. I remember hearing it expressed in broken English some years ago at a Cooper Union meeting. A speaker who was extolling to an East Side audience our system of free democracy, and contrasting it with the aristocracies of Europe, shouted as his climax, "In America everybody makes the law for himself." There is in this rude statement a very considerable germ of truth. We have not officially recognized it, and there are evidences that a growing public sentiment is arising to abolish it from the spirit of our law. But it is still with us, and we are responsible for it. The first trial of the notorious Thaw Case in New York furnishes us with a comparatively recent but not extreme example.

This trial, it will be remembered, exhibited a middle-aged, experienced, and highly successful criminal lawyer defending a young man who, if sane, had admittedly committed the crime of murder, apparently in cold blood, by shooting an elderly man from the rear, when he could have had no opportunity to defend himself from attack. Of course the only defense which the law recognizes to that crime is the insanity of the of-

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fender. In summing up the case, however, this lawyer, practically ignoring all evidence of the insanity of the prisoner, which for days had been accumulating on the record, ignoring the only *legal* defense which could be interposed between his crime and the punishment fixed by criminal statute, besought the jury in a burst of eloquence to override the law and base a verdict of acquittal upon what he described as "dementia Americana," that is, the right as an *American* of this young man to commit murder because three years before his wife had told him, whether truthfully or not, that she had been assaulted by the murdered man; and he made this plea notwithstanding the fact that the truth or falsity of the wife's story was not in question and the Court had refused to permit the District Attorney to prove her story to be false. He audaciously likened this young man in the doing of this crime to Sir Galahad and to the priest performing at the altar the most sacred religious rite of the Church.

Now, in making this plea, this lawyer was acting upon the experience of many years of successful practice at the criminal bar, exercising the judgment of an expert (in this case apparently an erroneous one) upon the American temper-

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ament. He was showing us in the clearest possible form what his experience had taught him of how little respect American juries have for the law. He made that address, we may assume, because he had learned that the chord of sentiment, strongly touched, can induce jurors to disregard the law and usurp a power never committed to them — the power to condone the offense and to pardon the offender. The District Attorney, on his part, marred an otherwise admirable address by a similar appeal, and, to offset that indulged in by his adversary, made a passionate rhodomontade about the dead man crying from his grave for a vindication of character — a thing which was not within the legal province or power of the jury to give.

Whether the disagreement of the jury on this trial was brought about by either of these pleas is not the point. The point is that both the prosecuting official and the defendant's counsel should expect, *as a matter of course*, that the verdict of the jury was likely to be influenced strongly by matters entirely outside the evidence, and having no just relation to the questions which the law either required or permitted them to decide.

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Coleridge says somewhere that "the defects of great authors are virtues carried to an excess." What he says of authors may be no less true of the races of men. The American temperament finds a special weakness in its attitude towards law, in the overgrowth of those virtues finding their well-spring in generosity. If we may be permitted to say kind things of ourselves, we are temperamentally warm-hearted, quick of sympathy, ready to excuse and forgive.

We have both the desire and capacity to put ourselves in the other man's place. In exercising this virtue we have in times past not infrequently but often overlooked other considerations, which should balance and check it. An acute observer has said that in the normal American there is a streak of lawlessness. He may have it enough in control to restrain himself from any serious breach of order, but it makes him often ready to condone the lawlessness of some one else, especially if the thing done is something which his heart tells him he *might* have done himself. The rights of society have at times lacked substantial recognition, not only because what may be called our "law sense" is not strong, but also because with us the education

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of the imagination has been somewhat one-sided. We can see the culprit and his distressed relatives, we can imagine the consequences of conviction to the accused individual, but the consequence of acquittal to the injured community has often proved beyond our mental vision. For this reason we are notoriously lax in punishing criminal offenses where the injured party lacks respectability. The affront to society dwindles to a vanishing point when the victim is a bad man.

Some time ago I heard of a conversation between a Boston lawyer and a Southern judge which gives a fair illustration of this point of view. The Northerner had commented rather caustically upon recent acquittals in certain murder trials in the South, and said finally, "I don't understand the process of reasoning by which these verdicts are reached."

"Well," said the judge, whimsically, "I guess it is mostly about like this. When the jury retires, it considers all the evidence on the main point; that is, whether the dead man *ought to have gone*. If they think he had, they don't make much point about the technicalities of the case and his going a little sooner than perhaps he might."

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In his essay on Lincoln, James Russell Lowell says: "Among the lessons taught by the French Revolution, there is none sadder or more striking than this — that you may make everything out of the passions of men except a political system that will work. . . . It is always demoralizing to extend the domain of sentiment to questions over which it has no legitimate jurisdiction." This danger of over-extending the jurisdiction of sentiment finds with us no more numerous illustrations than in the working of our criminal law. But let us remember that the responsibility for this danger is only secondarily with the courts. The jury system is an essential part of our criminal law machinery, and respect for law on the bench is sounding brass and tinkling cymbal unless the same spirit is strong in the jury-box as well.

To-day perhaps the strongest and worst influence for lawlessness which our country knows, the primary responsibility for which does not belong to the courts, is yellow journalism; the journalism which in everything it recounts or describes uses exaggerated sentimentality, freely mixed with falsehood, and which at best furnishes to adult readers, nothing better than dime-

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novel pictures of daily life; the journalism whose very existence depends upon bringing some fresh excitement to startle the overfed emotions and arouse the passions of its readers. At times its responsibility for lynch law in the South, for example in the outrages at Atlanta five years ago, has been clearly shown. What it does in creating an atmosphere which influences and induces the commission of crime is only equaled by what it does after criminal offences have been perpetrated. It surrounds important criminal trials with an atmosphere of emotional slush and worked-up heart interest; it prejudices cases in advance by circulating broadcast lying rumors and fake interviews; it injects unfounded prejudices into the community from which the jury must be secured, making the doing of justice difficult in the extreme.

While in its ordinary activity this journalism is simply an offense against good taste and decency, in its relation to the enforcement of criminal law it is nothing less than a public menace. It taints the whole atmosphere in which justice is to be done, and increases immeasurably the difficulties of obtaining jurors who can do their duty uninfluenced by preconceived notions with

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which these newspapers have filled their minds. It took over three weeks and an immense expenditure of time and money to get a jury of twelve acceptable, unprejudiced men in the Thaw case in New York. In Chicago, the trial of Cornelius Shea, the strike leader, in 1906, took from September 13 to November 29 before the preliminary work of empaneling a jury was completed. Before a jury was finally accepted, more than six thousand citizens were summoned for examinations as jurors, and nearly three months of the time of the court was consumed.

The Ruef case in San Francisco took even more time in getting the jury. Some of this waste of time in selecting the jurors is fairly attributable, of course, to defects in the criminal law as a system, but an equal portion of that criticism belongs to a public which reads and supports sensational newspapers — and (another matter for which the Courts are not primarily responsible) to that highly respectable part of the community which dodges jury service.

Somehow we have got to make the dodging of jury service dishonorable and disgraceful. We cannot begin too soon. In some States it has gone to such an extent as to become a public

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scandal. In Massachusetts, for example, Governor Guild, in a message to the legislature some years ago, gave a very dark picture of the present condition of the jury system in that State. "When," he says, "the bench itself in public utterance gives evidence as to the appearance even of the intoxicated, the criminal, and the insane on Suffolk juries; when pressure is notoriously exerted to secure places especially on these juries as a compensation for political favors; when men high in social and commercial life similarly exert pressure to be excused from jury service, it is certainly time that the authorities designated by law should be safeguarded from such improper influences." Judge Richardson, of the Superior Court in Boston, stated some time ago, according to the Boston "Transcript," that at a recent term of that court the jury list furnished one utter imbecile, one man in the last stages of delirium tremens, and an individual who asked to be excused from jury duty because, having recently served a term in the House of Correction, he felt he could not act impartially in giving a sentence which would consign another to such durance vile!

A London paper recently expressed the Eng-

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lish opinion of our system of criminal law as "trial by the amateur judgment of a democracy." To a marked degree this striking criticism is undoubtedly correct. Speaking broadly, we have to a large extent given over our criminal law for its enforcement to the man in the street. We have chosen to put the enforcement of that law in the hands of untrained jurors, presided over, but not directed or controlled, by a judge who keeps order and deals out abstract rules of law. We have deliberately reduced the authority of the trial judge to control and direct the proceedings in his own court — we have enlarged the powers of the jury in proportion.

We have whittled down the powers of our judges greatly. In many States, especially in the South and West, in constitutions adopted by the people limitations have been placed upon the authority of their judges over trials by jury, taking away ancient functions which at common law had been exercised by judges for centuries. Some of these States have made the jurors judges of law and fact in criminal cases, and have reduced the position of the judge to that of a mere adviser, whose opinions they may disregard if they please. In other States the statutes

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say the judge shall not sum up the evidence or intimate any opinion on the facts; others, that the judge shall not charge the jury at all, but shall simply mark his approval or disapproval upon written propositions of law by the lawyers, which he must not explain or modify for the instruction of the jury. There are American States in which the judge has to charge the jury that they are judges of the law and are not bound by his instructions or by the decisions of the Supreme Court—in which the jury not only decides the crime but fixes the punishment as well.

Now, we say we do not believe in mob law. We mean that we do not believe in lynching and in other acts of lawless violence. Lynch law, however, is only one form—the disorderly form—of mob law. There is, nevertheless, another type of mob law, orderly in the sense that it does not necessarily involve bloodshed, which in recent years has grown up in this country, and which deserves thoughtful attention. It results logically and inevitably from the overdevelopment of the powers of the jury. When the judge is shorn of his power so to direct proceedings in his court that the trial shall be

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one by law as well as by jury, when the verdict to be reached in criminal cases can be made to depend largely upon influences brought to bear on the jury-furnishing community either before or during the progress of a trial, there are great inducements offered for the working-up of orderly mob law — trial by newspaper and trial by mass-meeting, before the actual judicial hearing of a criminal case.

The Moyer-Haywood case in Idaho and the McNamara case in California furnish good examples of both these forms of mob law. The accused defendants were entitled, of course, to a fair trial before an impartial tribunal, and to such verdict for or against them as the facts adduced on that trial might justify. Instead of waiting for a court and jury to pass in due course upon the indictments against them, we had for months all over the country Moyer-Haywood mass meetings, and later, McNamara meetings, in which the accused men were tried and found innocent; in which the effort to raise funds for their defense, a perfectly proper object, was apparently made subordinate to a desire to inflame opinion among the working-people in advance of the trial, and to make, by oratory,

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heroes and possible martyrs of these men before the very beginning of the actual trial by law.

The trial by newspaper of these cases went on in the same way. Journals whose constituencies are strongly in favor of property rights recorded, during the Moyer-Haywood agitation, all the real or alleged outrages perpetrated by the Western Federation of Miners, and did not hesitate to express the hope that an example would be made of these men who had been at the head of that organization, as though the organization itself was on trial. The labor press in return reflects and reproduces the sentiments of the mass meetings. The same process was repeated in the McNamara affair. The case was first tried in the newspapers and magazines, the detective Burns writing for the prosecution and Gompers crying fraud and oppression for the defense. Long before the actual trial began, public interest was satiated and jaded, and was only to be revived for an instant by the subsequent collapse of the defense and the admission of guilt.

One of the great dangers of this method of trying criminal cases in advance is that false state-

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ments, oratorical exaggerations, and unfounded rumors often form a large part of the "evidence" in these trials by mass meeting and by newspaper, evidence which dares not appear in court under oath, which will not stand analysis before an impartial tribunal, and which crumbles and goes to pieces under examination. The public which reads or listens to these appeals to mob law, and which is led by such statements to form opinions, and to expect a particular verdict as the only one that can be rendered by any fair-minded jury in any impartial court — this public is not merely disappointed or surprised when the verdict at the legal trial is contrary to the verdict of the newspaper trial or the mass-meeting trial. The decision of the court or the verdict of the jury, so at variance with what it had been led to expect, becomes at once extraordinary and unexplainable, and a suspicion arises, amounting to certainty, that in the law court there has been a miscarriage of justice, that bribery has corrupted the court or bought the jury.

It is to be doubted whether respect for law is encouraged or promoted, even in cases where the trial by law happens to coincide in its conclusion

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with one of these forms of trial by general opinion. The ordinary result in such instances is not a greater regard for the wisdom of the courts, but rather for the power of so-called public opinion. The advocates of mob law find in such cases impressive evidence of the force and effect of their own efforts in having created a public sentiment to the demands of which the legal tribunals have been compelled reluctantly to conform. Whether it wins or loses, this mob law tends to diminish respect for the courts. The full responsibility for its existence and growth we cannot lay fairly upon the courts themselves. It is largely a matter of our own choosing, and its development is in no small measure due to the changes in our law which I have mentioned, which have encouraged it and furnished its opportunities—the changes in law which have taken away the necessary powers from the judge and which have negated the authority of trained opinion and experience over the processes of justice by law.

To those to whom these words seem to imply a lack of faith in the people from whom the jurors are chosen, I can only say that I entertain no such opinion. With an intelligent and

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experienced judge exercising wisely the necessary powers of his office, the jury system is open to as few objections as any human institution. But we need the trained mind of the judge, and the benefit of his wisdom and experience. Without it the jury system (particularly in criminal trials) is often quite another matter. It involves no heretical dissent from the highly popular "trust-the-people" doctrine to suggest that we may carry the referendum ideas too far. We can never hope to have in this country a Demos more intelligent than the one which convicted Socrates.

It is not only because the State constitutions and statutes have taken away his former powers that the trial judge at times seems such a passive figure in his own court. An additional reason — for which, however, the public is not responsible — is in the attitude of the appellate courts towards those slight mistakes in procedure and insubstantial matters not relating to merits which are bound to occur in any protracted criminal trial. It has been said often and truly that our appellate courts are over-technical in reversing criminal cases for these small matters, where on the whole the convicted person is

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shown to have had a fair trial and to have been found guilty on sufficient evidence.

It is, of course, true that the percentage of cases reversed on appeal, compared to the total number of criminal trials in lower courts, often seems very small. The grievance, however, is not so much in the number of men who escaped directly by these technical decisions as it is in the number who escape indirectly through the loopholes they afford, and in the burden which these hair-splitting rules of law put upon the trial judge in all the cases he tries. When the appellate courts regard technicalities as though they were as important as the substantial question of guilt or innocence, the judge who presides at the actual trial must do the same thing. With the fear of "error" ever before his eyes, he has to spend time and thought on matters of small actual importance at the expense of the main issue. He is often literally afraid to take affirmative action in regulating and controlling proceedings in his court for fear of reversal.

At times substantial delay in criminal cases is due to the efforts which a careful judge is obliged to make in trying to avoid a technical error. In the Thaw case, for example, the pro-

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ceedings were adjourned by the court at least once to enable counsel to furnish briefs to the judge on the propriety of the form of a single question ; that is, simply the form in which a witness should be asked what he knew about the insanity of the defendant. The legal phraseology required in such questions constitutes a special branch of technicality of the most hair-splitting type, in which the State Court of Appeals had indulged in years past, and which requires the trial judge to be especially careful lest he make a mistake — one which, if made, however, would ordinarily be of the most insignificant actual importance. This fear of error tends to make the trial judge a negative rather than a positive force in his own court, even in States where there are no constitutional or statutory limitations upon his own powers.

Whether induced by statutory limitations of his power or by the burden of technicalities which his shoulders must bear, this sapping of the ancient power of the judge in jury trials has been done at a very great expense to society, and has given aid and comfort to a multitude of criminals. Through these influences very largely it has come about that "trial by the am-

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ateur judgment of a democracy" has been substituted for the system of trial by judge and jury; and important criminal cases too often are permitted to degenerate into interminable dramatic spectacles surcharged with a riot of misleading oratorical fustian, and with all the details of the failure of justice in them exploited as a daily and sometimes hourly melodrama by a sensational press. And yet we wonder why the foreigner and the recent immigrant lack respect for our law!

In these oratorical contests the interests of society suffer a serious handicap. "The time has come," as a Court of Appeals judge in New York recently declared, "when in a criminal trial the defendant's counsel insists that every word uttered by the District Attorney shall be taken by the official stenographer and made a part of the record, for the purpose of catching some expression that may escape his lips, which to the ears of the Court may sound inappropriate or unfair, and thus afford us an opportunity to swing the whip and give him a lecture. Such lectures have already been given in a number of the opinions written during recent years by the judges of this Court, and still we have been

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careful to refrain from reproving counsel defending criminal actions for indulging in similar expressions, or of imposing upon them like restrictions in conducting their defense; and yet the attempt of counsel defending to shift the trial from his client to the District Attorney, and thereby create an impression in the minds of the jurors that the District Attorney is unfair, and that his client is being persecuted, has been too often indulged in and too often has been successful."

The difference between the position of the trial judge in the English courts and in the State courts of this country has been well expressed by a Philadelphia lawyer, Thomas Leaming, in an interesting paper read before the bar association of his State a few years ago. "An American lawyer," he says, "will say, 'I tried a case before Judge So-and-So.' An English barrister says, 'I conducted a case which Lord So-and-So tried.' He [the English judge] decidedly restrains counsel, often examines the witnesses, and his influence is quite openly exerted to guide the jury and cause them to avoid absurdities and extremes. Yet the crucial questions of fact really to be determined — of which there are

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usually only one or two — are left absolutely to the jury's unfettered decision."

The delays, the waste of time in criminal cases and in jury trials generally in civil courts, — delays which disgust intelligent men and often make them unwilling to act as jurors and to shirk that duty, — are largely due to the lack of power of the judge to control proceedings in his own court. In conversation recently with Justice John W. Goff, a New York judge of long experience in criminal trials, he made a comparison between a famous poisoning case at which he presided some years ago and one which he had witnessed as a spectator while in England. Both cases were sensational ones. The English case was of a singularly interesting character. A young and attractive woman of good family, engaged to a young man of excellent social standing, was on trial at Winchester for murdering her sister by poison. The father of the young woman had recently died, and though reputed wealthy, had left a meagre estate. The elder sister, fearing lest her inability to provide the expected marriage portion might lose her the marriage with the man to whom she was betrothed, conceived the idea of insuring her sister's life, and by poisoning her

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to secure the needed money. She consummated her design, but her crime was discovered. She was indicted and brought to trial. The whole countryside was interested in the case, and the talk of it was on every tongue. Yet it took only three hours to select the jury. It took over three weeks in the American case to which the judge referred. In the recent sensational poisoning case of Dr. Crippen the English jury to try this defendant was empanelled in eight minutes!

The difference in time required for the selection of these juries lay in the fact that in the English trial the jury was selected by the court with the assistance of counsel, and in the American trial the counsel selected the jury in the presence of the judge. American traditions are all against the judge "interfering" with counsel in the selection of jurors in important cases, and a judge hesitates to take affirmative action to prevent the waste of time occasioned by interminable questions to prospective jurors for fear that his ruling may be considered as technical error in a higher court, resulting in a new trial and a general waste of more taxpayers' money.

It may seem to some that undue emphasis has been laid upon the importance of relieving the

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judge who presides at jury trials from these statutory restraints and from the incubus of these technicalities. In answer I can only plead that in so doing I am but repeating sentiments which have been voiced at professional gatherings and meetings of bar associations, by great judges and learned lawyers for twenty years. In the public mind, through our top-heavy system of appellate courts with their multitudinous decisions, the notion has gained currency that the judge who stands closest to the people, who hears criminal cases when they first come to trial, has less dignity than his brothers in the so-called higher tribunals, and that the extent of his power is of minor importance when compared with theirs. This is undoubtedly a serious mistake. The test for the efficiency of the whole judicial system, as an instrument for punishing the guilty and protecting the innocent, is in the power of his court and in the wisdom and dispatch with which that power is there exercised. No amount of wisdom and learning in the labyrinthine recesses of the appellate courts can create respect for a law which breaks down through weakness and uncertainty at its vital point of contact with the people.

The importance of the reform of our criminal

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law is made startlingly clear by a consideration of the growth of criminality in our country alone of the great civilized nations.

Recent insurance statistics of thirty American cities show an average of 7.2 homicides per 100,000 people in the period from 1901 to 1911, an increase of 2.3 over the preceding decade. The average for England and Wales is only 0.9 per hundred thousand! The ratio of murder to population is increasing in our country. The American Prison Association's Committee on Criminal Procedure declares that not one out of four murderers in the United States is brought to trial; that out of twenty-five brought to trial only one receives a death sentence. According to the same authority ten thousand homicides are committed in this country every year — more than the aggregate number for any ten civilized nations exclusive of Russia.

The two great evils of our criminal law to-day are technicality and sentimentality. For one of these defects the remedy must come from the hands of the legislatures, the courts, and the lawyers. Admirable legislation for that purpose has been adopted in many States within recent years. The other defect must depend for its cure upon

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the growth of a public opinion, under the demands of which reason, sober sense, and regard for law shall control all other influences and emotions in the jury-box. Our discontent with the criminal law, to be effective, must direct itself to the removal not merely of one of these evils, but of both.

VI

Criticizing the Courts

VI

Criticizing the Courts

IN a general sense the question of the right to criticize the courts is no question at all. In a democracy every institution is necessarily the subject of criticism, often of an offensive and painful character; and to this general rule the courts are no exception. Indeed, in one sense, the courts are peculiarly the subject of the criticism of experts. Lawyers who try cases are engaged in testing the judicial capacity of judges. Lawyers who appeal from a lower court to a higher court are engaged in criticizing the judge who was responsible for an unsatisfactory decision. The appeal judges are paid by the State to act as critics of their brethren in the court below. In view of this machinery through which the courts are subjected to the animadversion of professional critics, it would be a hardy or a very foolish man who would assert that criticism of the courts should not be indulged in by laymen.

But, while the general right to criticize is not disputed, there has been evident in recent years,

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and generally in political campaigns, a somewhat vague attempt to draw an imaginary or real line between the types of criticism which are permissible and those which are not and which constitute what are called "Attacks upon the Courts."

If we were to attempt such a classification of current criticisms of the courts, we should find, in the group concerning which the right to criticize is unquestioned, such subjects as the breakdown in certain sections of our criminal law, the defects of over-cumbersome procedure, the imperfect condition of judicial machinery, and the time-honored complaint of the law's delay.

Modern conditions are the natural causes for these criticisms. The improvement of judicial machinery is a matter of very considerable importance. The amount of work which has to be done by the courts is enormous in comparison with what was required a half-century ago; and with the increase of litigation, the inevitable result of our more complicated form of society, the strain upon the machinery of the courts has increased. We are applying efficiency tests to industrial processes to promote speed, accuracy, cheapening of cost, conservation of energy, and

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the adaptation of means to the end sought. These critics demand the application to the courts of the same principle of scientific management which to-day bids fair to revolutionize the machinery of production. There is, they assert, the same need of economic efficiency in the courts as in business. Their criticisms have a double aspect: one which relates to defects in the machinery of procedure and practice, and aims from a standpoint of efficiency to reconstitute the processes of justice; and the other, to the substitution of a new and more healthful spirit for one in which the broad ethical demands of justice are too often subordinate to unserviceable technicalities and trifles.

On these subjects we have now an aroused public opinion, guided by leaders of recognized standing and authority. A demand for law-reform supported by the leaders of the American Bar, and by the judges themselves, is nowhere considered as in any sense an attack upon the courts, as that much-worn phrase is currently used.

The subjects which have been mentioned are not controversial ones, since we are all interested in having our courts improved in efficiency, and our criminal law made sure and speedy.

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Criticism of the courts for defects in these matters has never written a line in a party platform pledging any political organization to the defense of the courts against attacks upon the judiciary.

When, however, we have passed from the consideration of these matters, upon which public opinion is substantially in accord, to the consideration of the relation of the judiciary to the public policy of the State and Nation, we have entered the field in which the existence, or at least the extent, of the right to criticize the courts, is challenged or denied as a political issue.

It is the recurrence of an old subject in a new form. The right to criticize the Supreme Court and to question the finality of its decisions on political problems, half a century ago was a subject of debate in the great controversy over the nature of the Constitution which later culminated in our Civil War. The right to criticize the judiciary and to question the finality of decisions upon economic, industrial, and social problems is the open public question of our own time, and is the fundamental issue in the current discussion of attacks upon the courts and current defenses of the judiciary.

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The question rarely, however, is expressed concretely in this form. Ordinarily the issue becomes available for political purposes in the highly utilitarian literature of party platforms, through the form or manner of criticism upon court decisions, on grave public questions, indulged in by prominent public men in an opposite camp; and the "defense-of-the-judiciary" planks, evoked by such utterances, deal with rebukes of the manner of these criticisms more than with their substance. The Republican planks which defended the courts against Bryan and his criticisms of the Income Tax decision, and the Democratic planks which defended the courts against Lincoln and his criticism of the Dred Scott case, and more recently against Roosevelt and his criticism of the Bakeshop and Sugar Trust cases, are alike in this regard.

There exists to-day, no doubt, a wholesome public opinion which protects our courts generally from the vilification and coarse libeling to which our legislative and executive officers are constantly exposed. To a certain extent, party platforms which protest against attacks upon the courts are healthy expressions of this public opinion.

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It is an encouraging feature of our democracy that, at least in our attitude toward the courts, we have, by general consent, decided to be civil. It is an attitude which to-day protects our courts from that criticism, unlimited either as to form or substance, which relentlessly pursues prominent members of coördinate branches of our government. It is a comparatively modern development of democracy.

The distinction made between the courts and other executive and legislative officers as to the form of criticism applicable to them did not exist at the time our government was founded, nor in the so-called "Golden Age" of the Supreme Court. It was recognized neither by the public nor by the great statesmen of the past. Jefferson, for example, indulged in criticism of the Federal Judiciary which would be intolerable to-day from any living public man. "The Judiciary of the United States," he declared, "is a subtle corps of sappers and miners, constantly working underground to undermine the foundations of our confederate fabric." His followers, who shared his bitter animosity against Marshall, joined with him in his repeated attacks upon the great Chief Justice. After the Jeffersonian re-

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sistance to the power asserted by Marshall in his court to declare laws to be unconstitutional had ceased ; after the disappearance of the Jacksonian doctrine, asserted in the matter of the rechartering of the Bank of the United States, that each branch of the Government was a law unto itself as to the construction of the Constitution, and that the Executive might on this theory disregard a construction given to that instrument by the Supreme Court in holding that such a bank was authorized by the Constitution ; after the disappearance of the still more dangerous heresy, originated by Jackson, that the Executive might refuse to compel the enforcement of a resisted judgment of the Supreme Court if that judgment happened to be displeasing to the Executive, — after these and other contests for power between the executive, legislative, and judicial branches of our government for the time being had been settled, the modern doctrine of judicial immunity from political criticism began.

That immunity John Marshall never enjoyed. During substantially the whole of his judicial career, while he was rendering that long series of constitutional decisions, political decisions in

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the higher sense of the word, through which not merely the extension, but the very existence of our national life was made possible, he was the object of partisan criticism of the bitterest kind. The old nationalism of Marshall was an alarming doctrine to the early Jeffersonians. The development, through these decisions, of a nation, where Jefferson desired merely a confederation of jealous states, required not merely judicial decisions, but public discussions of those decisions and the final acceptance of them by the people as wise statesmanship, as well as sound interpretations of our fundamental law.

Marshall ceased to be the subject of political discussions only when public opinion had concluded that an American nation, harmonized by a great American court, was not a menace to the sovereign states. No one would have dreamed of saying at any time during the first twenty years of Marshall's incumbency in the Supreme Court that any decision of that court was to be taken as the final word on the relation between the states and the nation; that is, taken as the final word in the sense that the political problem involved in it was not to be discussed, criticized, defended, or condemned.

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It was largely through the discussion of the expansive principles of Marshall's constitutional nationalism that public opinion became formed. Those principles were tested in public debates on the great question whether, under the Constitution, there was or should be an American nation rather than a mere federation of states. They were discussed and were understood—not in their narrower sense as legal decisions, but in their wider sense as constitutional political principles—by a public which listened to the great debates between Webster and Calhoun.

It was to no small extent because the great judicial decisions of Marshall stood the test of these debates, because the national principle of Marshall, expounded by Webster, appealed to the people of the North as something not only sound but worth fighting for, that the war was fought and the nation saved. The criticism of the judiciary which prevailed during most of Marshall's term of office did the court little harm, and did the nation infinite good; for it was essential, not only that the Constitution should be construed, but that the construction which made the federation of states a nation,

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should be known, weighed, balanced, tested, and accepted by the people.

The notion that the Constitution is a sacred puzzle for lawyers, concerning which the opinion of the people is unimportant, certainly did not exist in Marshall's time among statesmen, or even among lawyers whose opinions have escaped oblivion. The Jeffersonian critics were met, not by assuring them that they were attacking the courts and were enemies of organized society, but by replying to their criticisms in debate, thereby putting a wholesome public opinion behind the Court.

The more lawyer-like attitude toward the Court and the Constitution, the attitude that the decision of the Court on a constitutional proposition is not only final but undiscussible, and that public opinion in opposition to it is morally wrong, had its first conspicuous expression after Marshall's death, when Chief Justice Taney tore the safety-valve from the national machine, in the Dred Scott case, by substantially declaring that there was no way under the Constitution for the law-making branch of the nation to deal with the problem of chattel slavery.

Up to the death of Marshall, the criticism

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of the Supreme Court had been directed merely against its extension of the life of the nation by a broad construction of the Constitution. Taney's decision was a contraction of the constitutional life of the nation by the declaration of its powerlessness to act on a matter which peculiarly needed national action. The friends of slavery asserted that the Dred Scott decision was not debatable; that the judgment made by that august tribunal must be accepted in silence, and that the only lawful and orderly escape from its conclusion was by the amendment of the Constitution itself on the subject covered by it, — a thing absolutely impossible.

In all ages there have been classes of men, wise after events and not in them, who "build the tombs of the prophets and garnish the sepulchers of the righteous, and say that if they had lived in the days of their fathers, they would not, like them, have shed the blood of the prophets." This class in our own country is prone to look back to Lincoln's attacks upon the Dred Scott case, and upon the Court which rendered that decision, and assure itself that if it had lived in the same period it would have sided with him in his criticism. But the principle upon

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which Lincoln acted is far more important and vital to-day than the decision which he attacked. We, all of us, are able to see to-day that when the Supreme Court declared that the nation was powerless to remedy by law the iniquities of an industrial system which required law, it left no alternative for those who stood for freedom but war. We can look back and see that the acceptance of Douglas's position was impossible.

We are all able to see now, in the classic conflict between a small man and a great man, the distinction between a narrowly juristic and a statesmanlike attitude toward the courts. What we differ about is the application to the social, industrial, and economic rather than political problems of our own time of the same principle, which we admit was correct when expressed and applied by Lincoln. Most of us are ready to say that Lincoln, who was a great and far-seeing statesman and who is dead, was right; and that Judge Douglas, who is also dead and whom subsequent events and the judgment of history have found to be neither a statesman nor a great man, was wrong. But the same class that believed Douglas right when he was campaigning for the political issue which he called the supremacy of

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the courts are followers of his spirit to-day in the recrudescence of that issue in our own time; and the principle which Lincoln maintained has among them now as few friends as it had when he was alive.

It would be a rash person who would deny that Douglas's doctrine is not substantially that with which defenders of the courts meet their critics to-day. Lincoln asserted the right of the people to criticize particular decisions as embodying dangerous doctrines, and, more especially, when such particular decisions, as in the Dred Scott case, clog the whole machinery of government and leave it powerless to act where action is essential.

"We believe," he declared, "as much as Judge Douglas, perhaps more, in obedience to and respect for the judicial department of government. We think its decisions on constitutional questions *when fully settled* should control not only the particular case decided, but the general policy of the country, subject to be disturbed only by amendments to the Constitution, as provided in that instrument itself. More than that would be revolution. But we think the Dred Scott decision is erroneous. We

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know the Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this."

Judge Douglas asserted that a political issue based upon the criticism of this single decision involved or implied an attack upon the whole judicial system, and created, he declared, "a distinct and naked issue between the friends and enemies of the Constitution, the friends and enemies of the supremacy of the laws."

If Douglas was wrong and his doctrine was unsound at the time when it was enunciated, the political tendencies of our day afford still less excuse for its reaffirmation. The problems of our day are essentially different from those which formed the subject of the great debates prior to the Civil War. The political relation of the States to the Nation is settled. Our questions are not political in the old sense of the word, but primarily economic, social, and industrial. They are problems of corporations and labor-unions, of the regulation of railroads and industrial trusts, of taxation, of conservation of natural resources, of congestion and concentration, of natural and artificial industrial inequality. Back of all these problems is the

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fundamental one of the extent to which, under our constitutional system, they may be dealt with by law — and law of a new type.

As society becomes more complex, the whole tendency of legislation is to attempt to deal with the individual as a member of the state, instead of dealing, as formerly, with the state as a mere mathematical sum total of individuals, whose individual rights as such must be preserved, at least in theory, at the cost of society as a whole, and, far too often, at the cost of the individual himself.

This principle is old and well established in Europe, and consistent with the necessities of Continental government. It is new with us. It is a decided variation from American traditions. It is at variance in particular with the economic theory current when we adopted our Constitution, an economic theory which, having been unconsciously adopted, has tinged the interpretation by our courts of the broad generalities of our Constitution.

A historical discussion of the principle of the *laissez-faire* doctrine of Quesnay and Adam Smith would be out of place here. Its merit from the standpoint of history is in the immense

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service it rendered in the destruction of a bewildering network of ancient, meddlesome interferences with the liberty of the individual, a despotism which was rarely benevolent and almost uniformly destructive of the enterprise and initiative of the individual, and of natural and proper opportunities for self-development. No one can study the causes which led to the French Revolution without seeing that the overgrowth of the state supervision of the citizen, not for the benefit of the citizen, nor for the benefit of the state, but to afford luxuries to a selfish, idle, and fearfully extravagant court, was one of the main causes for the termination of the old *régime*.

The cry for individual freedom from governmental interference, the shibboleth that that government is best which governs least, was a natural reaction from the bondage of regulations of the past. This principle Europe soon found to be unworkable under Continental conditions. America, however, tried it under economic conditions unlike those in Europe, — in a new country with immense areas of free land, with few cities, where the opportunities for individual initiative were by nature apparently unlimited, and

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involving for a long time in their exercise no conflict with the interests of society as a whole.

As our society becomes more complex, with the enormous growth of our population, with the development of our cities, new industrial, social, and economic conditions are presenting problems for solution of the greatest difficulty. These questions in Europe are legislative questions, pure and simple. With us they are something more. One of the most important questions which confronts us in America is one which does not exist in Europe, and that is the exact relation of the courts to American economic problems. This is the main basis for current discussions of the judiciary. The principal critics of the judiciary to-day are those who are insisting that the economic and social questions which confront us, in so far as they can be affected at all by any branch of government, can be solved only by legislative and executive action, and require the greatest flexibility and freedom in those branches of government for the adaptation of the means to the end in accomplishing the result sought. They meet with criticism, and often with harsh criticism, each decision of the courts which in their judgment unnecessarily limits leg-

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islative and executive power in these matters. They are insisting that the courts should not still further complicate the enormously difficult problems confronting legislative bodies and executive officials, by imposing upon them constitutional limitations which are economic theories in disguise.

It is noteworthy that in America a considerable part of this criticism comes from a class which in no other country has any like attitude toward the judiciary, — the humanitarians who interest themselves in social problems, who study the conditions of the working-classes, who are allied in one association or another in endeavoring to improve social and industrial conditions in the country, and who formulate and support the legislation which aims at mitigating evils which threaten the lives of the poor.

An example of this type of criticism of the courts was given at the recent Child-Welfare Exhibition in New York. It was a series of photographs of the interiors of tenement houses in the terribly congested district of that city, showing men, women, and little children huddled together in small, unventilated rooms, filled with one kind of merchandise or another, and

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engaged in that unregulated "home-work" which is the main cause of that congestion: a form of industry destructive of every principle of home life, and in which not only are adults sweated, but children of all ages labor incredible hours for pittances incredibly small,—children for whose protection in the thousands of tenements to which these industries have now spread, even an army of factory inspectors would be inadequate. Over this series of photographs, to suggest that these conditions are its result, was printed a quotation from a decision of the Court of Appeals, holding, nearly twenty-seven years ago, that the legislature could not take away from the individual worker the right to transform his home into a workshop, and that legislation was unconstitutional which attempted to prevent that congestion "by forcing him from his home and its hallowed associations and beneficent influences to ply his trade elsewhere."

The relation of the courts to economics is not settled. It is an enormously important political problem, a problem which affects and involves the whole future of American government. It requires discussion. It forbids finality to judicial decisions which involve this problem until the

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best wisdom of the courts has been supplemented and properly modified and influenced by the best opinion of the people. Take a single example, the much-discussed recent decision of the New York Court of Appeals in the Workmen's Compensation Act case, with which the public is now generally familiar.

Here we have a situation which gives a concrete illustration of the whole problem. New York, like other American industrial states, had and has a system, or rather lack of system, of dealing by law with the enormous number of accidents in factories and industrial establishments, which its own courts admit is unjust to the worker, inadequate, inefficient, and uncertain. The legislature appointed a commission to make a careful and extended examination of these defects and injustices, and of the problem of industrial accidents generally. The commission made a report to the legislature and recommended certain legislation. That legislation was of an extraordinary radical character. Yet it was passed, not only with a most surprising lack of protest from the employing classes, but with the active support and approval of great employers, who realized the weight and injustice of the great

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burden of accident-loss which is thrown upon the helpless workers and their families.

This legislation was supported by associations of the bar in the State, whose representatives urged that the gross injustice of the present system needed radical changes, and recommended the legislation presented by the commission. This legislation was based upon a principle, not new and untried, but in successful operation in England and in every great commercial country in Europe. When, however, this law was tested in the courts, the Court of Appeals declared that this principle — which was social justice as recognized in England and on the Continent — was in New York confiscation of property of employers without due process of law ; and that under the Constitution of New York, and the fourteenth amendment of the Constitution of the Nation, the State was powerless to enact a law of this kind unless the people should accomplish the superhuman task of amending both constitutions. A proposed amendment of the State Constitution is now before the legislature as I write.

Optimistic, indeed, are those to whom there appears to be nothing dangerous to the future

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of American government in such conflicts between the court and the legislature! To the critics of the judiciary there seem open but two alternatives: either to accept, with the Socialists, such decisions as final declarations of the powerlessness of the American State to bring about justice by law, and of the breakdown of constitutional government; or to try by further discussion, and by criticism of such judicial conclusions, to reach a definition of "due process of law" which does not involve either the collapse of justice through legislative paralysis produced by the courts, or, on the other hand, an actual rather than a fanciful confiscation of property or property rights.

Time alone will tell whether critics of such decisions are conservative or radical forces in our society. When Turgot was advocating the abolition of the *Jurandes* and *Maîtrises*, he was attacked as a dangerous radical. History now regards him as a great conservative, who foresaw that the continuance of intolerable abuses meant increasing distress and discontent, and perhaps revolution. The supporters of government by law, who defended the *Dred Scott* case against political criticism, considered themselves conserv-

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atives. The principle they defended made for war.

The mental attitude in which their successors defend the courts against such criticism of decisions involving economic questions makes for Socialism. A statement of that attitude except in a fragmentary way is difficult in the limits of a paper like mine. It is, however, something like this. A large class of well-meaning, educated, well-to-do people in our country view with alarm, not so much the causes for industrial discontent as the means proposed at times to remedy social maladjustment. This class includes not only those whose opposition is based upon purely selfish interests, and whose opinions are negligible in all discussions of principle, but another class deserving of the highest consideration, as representing a sane and intelligent conservatism. To this class our modern legislative tendencies are distinctly alarming. They note the increasing number of statutes which regulate, inspect, limit, or prohibit industrial activities which had formerly been free from state interference or control. They fear more the meddling hand of crude or careless legislation than those evils of unregulated industry which by their

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statutes the lawmakers seek to mitigate or remove.

To these conservatives, the courts seem the main, and at times the only power against what is to them the new barbarism, whose principle means of expression is legislation. They look to the past, and see in the regulative legislation of our own time an attempt to revive in a new form cumbrous, unworkable, and destructive systems of legislation which belong to the Middle Ages in England, and which France threw off with the Revolution. They say that history affords clear proof that the adoption of that theory of industrial liberty which began with the French economic philosophers of the *laissez-faire* school contributed more to the enormous development of industry in the nineteenth century than any single force; that the impetus to individual initiative, generated by the removal of legal restraints upon individual liberty, has transformed the whole industrial and social world in which it has been applied; and that to sacrifice that principle, or to limit it by unwise legislation, is not progress but retrogression, the repudiation of a priceless birthright.

They see what we all see, that our political

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parties for the most part have no programmes which deal with fundamentals ; that references in party platforms to economic problems are almost invariably vague generalities. They see that in the absence of party programmes on these subjects, a growing volume of questionable legislation is proposed in state legislatures and at Washington. They see bad laws enacted, and worse laws proposed. Some of all this is due to corruption ; some to a desire to gratify mere mob passion ; and some of it, and indeed most of it, to a genuine but often ill-advised and ineffectual desire to meet and remedy social and industrial evils which require law. To stem this current they look to the courts. They are asking the courts to enlarge their functions by declaring such legislation unconstitutional ; by interpreting laws which they do not nullify, in such manner as to remove their sting by ignoring their plain meaning. Some of the more Bourbon of these advocates of judicial aggression have even proposed the abdication by the legislature and Congress of their functions in dealing with certain of these vexed questions, and the leaving of them to the courts for solution : urging, for example, that the common law and the courts

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can, if undisturbed by meddling legislation, furnish an adequate remedy for the problems of industrial trusts; that the Sherman Anti-Trust Law, with its sweeping generalities, should not be amended or repealed, but left for the Supreme Court to furnish the missing statesmanship in its composition.¹

This principle, that the extension of the power of the Court in the sphere of government is or may be an antidote for bad legislation and tendencies toward executive aggression, is a modern heresy, and a dangerous one. It aims to place in

¹ Since this article was written, the United States Supreme Court has decided the long pending Standard Oil case. The substance of an amendment to the Sherman Anti-Trust Law, which Congress has repeatedly refused to make since 1896, and which the President in his message of January, 1910, refused to recommend, as involving an extension of judicial power dangerous to the judiciary itself, has been now written into this law, amid general rejoicing in the business world, by judicial interpretation. In his message President Taft had said, "It has been proposed, however, that the word 'reasonable' should be made a part of the statute, and then that it should be left to the Court to say what is a reasonable restraint of trade, what is a reasonable suppression of competition, what is a reasonable monopoly. I venture that this is to put into the hands of the courts a power impossible to exercise on any consistent principle which will insure the uniformity of decision essential to just judgment. It is to thrust upon the courts a burden which they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster."

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the judge a responsibility and a power which the Constitution never gave, and which the courts cannot exercise and should not exercise. There is no country in the world governed by courts. There is no place in the American system for such an experiment. The overdevelopment of the judiciary is no cure for legislative corruption or inefficiency. One of the most healthful indications of the vitality of American democracy is the general recognition of the weak spots in our government,—defects which these conservatives point at incessantly, and for which they offer judicial aggression as a cure. The common sense of the people rejects that cure as a dangerous nostrum, but the disease is recognized,—the partial breakdown of the machinery for law-making and law-enforcing, and the failure of that machinery to produce officials capable either of enacting, enforcing, or applying the kind of law which our present needs demand.

We are slowly reacting from the madness of mob democracy, the democracy which fills our ballots with a vast number of elective offices, bewildering to the voter, beyond his capacity of intelligent choice. We are recognizing these causes of the weakness of the State. We are

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everywhere planning revisions of our laws, in an effort to attain greater legislative and executive efficiency and honesty, by changes, for example, in electoral machinery in relation to the nomination of candidates for public office. One of the most recent of these new proposals, the judicial recall, is, however, a direct attack upon the independence of the bench. The advocates of judicial aggression must accept their full share of responsibility for this menace to judicial freedom, for it is an equally indefensible counter-proposition to their own heresy. Friends who multiply for us hosts of new enemies are liabilities, and not assets. Those who wish to use the courts to stunt or sterilize democracy are not true friends of the judiciary, despite their many protestations, or of the American system of constitutional government.

For the courts to maintain at all times under such conditions, between such widely divergent views, the position which the law and the Constitution require, is difficult. To satisfy both schools is impossible. That there should be criticism of the courts under such circumstances, with such jealous scrutiny of each important constitutional decision, is inevitable. It is to the

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credit of the courts that the volume of public criticism is not greater ; that the occasions for it, either fanciful or real, are comparatively so few. It is particularly to their credit that reactionary decisions are so infrequent, and that so generally they have taken in the consideration of legislation a true position, well expressed by Judge Harlan, when, in *Atkin v. Kansas*, he said:—

No evils arising from such legislation could be more far-reaching than those which might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice and reason or wisdom annul statutes that had received the sanction of the people's representatives.

The position in which the American courts are placed to-day is a peculiarly delicate one. On the one side are those to whom modern American legislation is the new barbarism threatening the States and Nation with a rank growth of meddlesome, inefficient, unenforcible laws injurious to industrial development, a growth noxious yet inevitable, unless restricted, as they ask to have it restricted, by new judicial limitations. On the other side are those who contend

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that legislation of the new type is necessary and unavoidable, that the collective principle so clearly expressed in industry in the great aggregations of capital can only be governed, so as to preserve an actual rather than a nominal individual freedom, by the enactment of wise law; and they, too, are looking to the courts to sanction, and not to destroy, new legislative programmes, and to permit such increase of governmental control over industry as will prevent the exploitation of the people. Hence the issue of criticizing the courts; hence unreasoning defense, and at times intemperate censure, of judicial decisions involving the Bakeshop Law, the Workmen's Compensation Law, the Sherman Anti-Trust Law, the Oklahoma Bank-Guaranty Law, the Interstate Commerce Law, and other legislative experiments with the collective principle.

That such an issue should exist is inevitable. A conservative institution is always subject to strain and stress in a period of progress, and in our country the courts have always been our greatest and best conservative institution. No single fact, however, more clearly indicates the general respect and confidence of the people for

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the kind of conservatism which the courts have so long expressed, than that no substantial faction or party in our country to-day desires the judiciary to throw off that conservatism and become "radical," or even "progressive," as that term is currently used. What we ask from our courts is, in fuller measure, that which in the main we are conscious that we receive: a conservatism which is consistent with a not too remote possibility of progress, a conservatism free from all entanglements with either radicalism or reaction, a conservatism which harmonizes the past with the future by preserving the present from violent oscillations through contending forces.

VII

The Police Judge and the Public

VII

The Police Judge and the Public

MANY years ago a learned naturalist wrote a book on the topic of "Earthworms." It seems at first blush a foolish subject for a book. Those who fish know that earthworms are good bait for certain fish; those who do not fish can conceive no great importance in earthworms. Yet this naturalist, after much study, was able to prove that the fertility of the earth was to an extraordinary degree dependent upon the activities of these interesting little creatures, who, by changing soil, brought the low underlying soil to the surface and made it rich.

The average citizen has as much regard for the police judge as he has for the earthworm. To him the police judge is a sort of necessary evil, performing a function akin to that of the embalmer or the man who attends to cesspools. The lawyer who is accustomed to spending his working day in the study of nice questions of law and in the exercise of logic and ingenuity in courts, presided over by learned jurists, in which

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property rights are determined, and where well-dressed litigants explain their troubles to jurors who are required to own property to qualify them to serve, where order, decorum, and the usual sanitary surroundings prevail — this lawyer knows little, and cares to know less, of those huddled, ill-smelling, ill-ventilated places, the police courts, where the ignorant, the vicious, the propertyless, get their notions of law ; where the foreigner makes his first acquaintance with American justice.

Because we have accepted for so many years the lawyer's professional attitude toward the police court, because to be a police judge is to be endowed with a doubtful dignity, the police court has been the branch of the American system of justice which has improved the most slowly. It has been dominated by ward politics ; it has been the court in which, in the novels, the alderman really presides with his all-powerful "pull." The police judge is in the popular mind to-day what Justice Shallow was in Shakespeare's England. We are just now interested, however, in criminal law reform. We, the public, wish our system for punishing crime to acquire greater certainty ; we want to abolish anti-

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quoted technicalities in the higher courts in which serious offenses are tried. But we are not yet generally interested in the police judge or in his dingy, dirty court. Because we have not been interested, because the enormous practical importance of the police magistracy so long has been unrecognized, we have in many, if not in most, of our city police courts, conditions which are appalling, and the correction of which is a matter of the most urgent importance.

The police court is the court of all courts which should be dominated by intelligence and honesty. It offers the greatest and most neglected field for constructive law reform of a type which as yet is almost unknown. The field is there because the really great problem of criminal law is the one which will exist after all the technicalities which now defend the guilty from the punishment of the State have been brushed away. The decrease of crime is a problem which sometime will be attempted, and perhaps will be solved by the police court and through the activities which must come from or centre about it. For this reason it is a most inviting, though still neglected, opportunity, open to those who are interested not in the criminal

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law of the past but of the future. That law must have a constructive side. It will have to be a criminal law which is not merely devoid of technicalities and unjust opportunities of escape for the guilty. It must have a branch which deals with the reform of the criminal, a matter of infinitely greater importance than any which has yet received practical attention. In this phase the public lately has become deeply interested, and its interest is manifested in a striking way.

Consider an example: In a Western State a young man, elected to a court of peculiar type, which combines the functions of the police court with others of a different character, has accomplished such results in one special part of the police court side of his work as to give him a great national reputation.

That reputation has been based on an idea of the greatest possible simplicity and on what he was able to accomplish through it. The idea was that the police judge should do something with children, that they should be better, and not worse, because they come before him. Instead of operating the judicial machinery in the usual perfunctory, treadmill fashion customary

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among these magistrates, he did three amazing things: first, he took an interest in the conditions which made the individual boy or girl go wrong; second, he took an interest in the child personally apart from the offense with which the child was charged; third, he took the trouble to examine the places of correction to which the machinery of his office in its usual operation would require him to send the child offender for punishment. The result has made Judge Lindsey and his Children's Court famous.

One fact regarding the success of Judge Lindsey which is specially worthy of comment is the instant response of the people to his work, the recognition and interest which that work has aroused all over our country, and the almost pathetic eagerness with which we have expressed our approval of a police court judge who is enough interested in one corner of his job to do something really constructive toward developing a useful court out of one of a traditional and backward type.

The public ordinarily is in advance of its existing law in the treatment of crime and criminals. It only needs officials who take more than a perfunctory interest in their work and who

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will give the people the facts and the plans ; the improvements will follow. When John Howard was made High Sheriff of Bedford County in England in 1773, he took more interest in his job than had his predecessors, for he visited jails himself, instead of leaving such matters to his deputy, as his predecessors had done. He found the jails under his control in a dreadful condition, and in them numbers of prisoners who had been there for months after they had either been found innocent by a petty jury, or who, for lack of evidence against them, had not even been indicted by the grand jury. He learned that these men were prisoners simply because they could not pay the jailers' and turnkeys' fees for their discharge. Now here was where a perfunctory official's duty ended. So far as these innocent persons were concerned, their continued incarceration was legal ; the jailer and the turnkey were legally entitled to these fees, and no person imprisoned in the jail could have his liberty, even if he were declared to be innocent, unless he were able to pay these fees.

Strictly speaking, it was not Howard's business to change the law. It was not his business to pass laws requiring sanitation and ventilation

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in the jails. It was not his business to go about and examine the jails in other counties as he did. John Howard was the father of English prison reform because he did these things which were none of his business. The perfunctory sheriffs who had preceded him had never investigated, or, if they had investigated, had never done anything about these conditions with which Howard busied himself. The reform was not a difficult one; it had simply lacked a man. One year after Howard was appointed Sheriff of Bedford County, Parliament enacted laws due to his representation of facts as to the condition of prisons. The fees which for years had kept poor and innocent persons in prison were abolished, and laws were passed requiring the prisons to be cleaned and ventilated, prisoners to be clothed, and infirmaries to be provided for the sick.

We hear so much about dishonest public officials in these days that we are sometimes inclined to exaggerate the importance of the speculator as an enemy of progress. It is perhaps no exaggeration to say that the dead-weight of the routine official is a heavier burden. The reform of governmental machinery, to be done effectively, should be done largely from inside.

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It is done badly in many cases because it has to be accomplished from outside, through the activities of persons who are not fully familiar with all the facts and are not in a position to get them, and who have to do work which could be done more efficiently through officials whose business it is to know the facts, but who have no sense of responsibility for improving conditions in their own provinces, and who have no special desire to change anything but their salaries. The most conspicuously useful servants our country has had in public office have been very largely men who had a talent for not minding their own business.

When the improvement of conditions in a given branch of government is not accomplished through the coöperative action of the public officials in it, or when that coöperative action is insufficient for the requirements of normal progress, it proceeds, not by slow, regular steps and stages, but by long pauses and adventitious jumps. One of these "jumps" in police court reform has recently taken place in New York. It came as the result of the inquiries of a Commission appointed by Governor Hughes in 1908, called a "Commission to inquire into the

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Courts of Inferior Criminal Jurisdiction," which made the report of its investigation to the New York Legislature in 1910, on the basis of which report legislation was at once enacted in that State.

While in one aspect of its work this Commission was dealing with an essentially local matter, — the conditions and workings of the lower criminal courts of a single State, and more especially of a single great city, — the report is of more than local interest. It is a study of a concrete phase of a general problem, and the work of the Commission will lose one half of its potential value if it does not lead to similar inquiries in other States.

The magistrates' or police courts of New York City are, through the magnitude of the business done in them, the most important of their kind in the United States. In them, the Commission declares, in the neighborhood of three hundred thousand persons are annually brought before the magistrates to answer some charge or complaint against them. Add to this enormous total the spectators or witnesses, the friends and relatives of complainants and defendants who fill these courts every day in the

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year, remembering that the vast majority of this throng are from the lower ranks of society, and that they get from the workings of the police court their principal, if not their sole, concept of American justice and the power and dignity of American law, and to the mind of even the most indifferent the character and quality of police court justice becomes a matter of superlative importance.

The well-to-do citizen subjected to the annoyance of an arrest because of a too impatient automobile, when he sits in a New York police court awaiting his turn, in the huddled hurry of its complex confusion, looks with curiosity at the line of unfortunates who come one by one from a door at a side of the court-room to the magistrate's desk. The men and women who compose this cavalcade at that moment, in the eye of the law at least, are presumed to be innocent. They simply have been without funds or well-to-do friends through whom to obtain bail. They have been "detained" until the magistrate has inquired into the facts to see whether there is any just complaint against them, and the inquiry into those facts is about to take place. Between the time of arrest and

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this pending examination, how have these presumably innocent persons been treated by the State? How have they been detained? After a night in a station-house, in which only the most hardened offenders, accustomed to park benches, can sleep, and after a breakfast which only the least civilized can eat, unkempt and sleepy, the prisoner comes to the portal of the court, the detention pen, in which he or she awaits the examination by the judge.

The Commission examined the detention pens. The conditions they found in substantially all of these courts were bad, and in many, particularly in the busiest of them, shocking. What they found is best expressed in the language of the report itself:—

In the Second or Jefferson Market Court, where the night court is held, the detention pens, to use the language of Magistrate House, “are in a horrible condition. There is a little bit of a lobby and two large pens. One side the women, and the other side the men. In the women’s detention pen, over in the corner of a little jog, is a toilet, but no door and no screen to shut it off. In order to pass these detention pens, you have to pass through a door that takes the prisoners back into the prison that is under the supervision of the Commissioner of Corrections, provided

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the prisoner is held for trial, is fined, or is held for examination."

The Commission, upon the occasions of its several visits, to the night court, held at Jefferson Market, was shocked by the conditions resulting from these primitive and inadequate detention pens. Women were huddled together, young and old, first and hardened offenders, some innocent and subsequently discharged, and this women's pen immediately adjoins the men's pen, similarly crowded. On several occasions there were more prisoners than these pens could accommodate, even with all the crowding, and the prisoners, men and women indifferently, stood in front of and beyond these pens. Some of the prisoners were engaged in loud talking, and the young and often the innocent were subjected to the indignity of being compelled to hear vile and blasphemous language.

To this and the other courts are brought large numbers of respectable persons who are not charged with any offense involving moral turpitude, but merely with the breach of some regulative law or ordinance.

In the courts in the Borough of Brooklyn the same conditions prevail, in the majority of instances, of inadequate accommodations and improper proximity of the pens for men to the pens for women, and in some instances the conditions are not only reprehensible but absolutely intolerable.

Until recently in New York, when a prisoner came from the detention pen to the courtroom for his examination, he was at once brought

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into contact with an institution which has resulted in an immense amount of injustice, through which there can be no doubt that hundreds, if not thousands, of innocent men and women have been subjected to undeserved punishment for crime. This institution was a matter of stupid and senseless court-room architecture, the infamous "bridge."

The old system of police court procedure was as follows: The policeman who made the arrest of the prisoner brought him across the court-room floor and placed him in front of a rail about as high as the average adult's shoulders. This rail was the outer guard-rail of an elevated platform reached by two steps at either side, and located immediately in front of the magistrate's high desk. The accuser and his witnesses, the policeman, the police court reporter, and the lawyers, if there were any in the case, stood on this platform or bridge, where they were on the same level with the magistrate and near enough to touch him. If they spoke in a whisper, the magistrate could hear what they said. They spoke with their faces toward the magistrate and their backs to the prisoner, who peered upward like a rat from a pit. The

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accuser was given a psychological advantage. He was *above* the man he accused, and pointed down at him when he gesticulated. He was close to the judge and on the same level while the prisoner was six or eight feet away from him and below him. The law says that a person accused of crime is entitled to be *confronted* with the witnesses against him. The architect of the bridge contrived that the accused person should see only the sides of the faces or the backs of the heads of those who bore witness against him.

The report of the Commission advising the abolition of the bridge is worth repeating:—

While the hearing is going on, the complaining witness, in most instances a police officer, stands close to the bench, with his back to the defendant, often giving his statement or testimony in a voice so low that the defendant, when he is below the bridge, cannot possibly hear him; the magistrate himself likewise frequently speaks in tones so subdued as to be inaudible to the prisoner, with the result that the policeman who is stationed on the bridge plays entirely too important a part, frequently conveying in laconic sentences to the prisoner the nature of the charge and the questions of the judge, and then conveying back to the judge the mumbled answers of the prisoner. On a number of occasions it was apparent to the Commission that

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the prisoner did not know what was going on, and that the hearing was one only in name. There being no witness chair, the whole proceeding lacked even the semblance of judicial procedure. Frequently there are so many persons on and around the bridge that it is almost impossible for the prisoner to see the magistrate. The interior arrangement of these court-rooms, thus briefly described, and this method of conducting hearings, are disgraceful in an enlightened community, and should be forthwith ended once and for all.

The thing has been done ; the bridge is now gone. By a few days' work carpenters have changed the whole aspect of the New York police court, and have immensely improved the possibility of justice to the poor. The pity is that so simple, so obvious, so cheap, and so important a thing should have taken so long and have required the solemn investigations of a Commission to discover and correct it.¹

¹ It has taken a Commission to reform this simple matter, the wrong of which has been apparent for twenty years to every thinking observer who has been in a New York police court. The same conditions still exist, however, in a different form in the city's higher criminal courts. In an endeavor to make those courts awe-inspiring, and to give large and commodious quarters consistent with his dignity to the District Attorney, the architect of the Criminal Court Building has provided a large railed enclosure immediately in front of the judge's dais, at one side of which are the seats for the jurors. The defendant is usually placed outside this enclosure and so far from the judge and the witness stand,

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Of course the abolition of the bridge will mean less speed in police court hearings. A prisoner put in a position where he can know what is being said against him, instead of receiving the scraps of information which formerly reached him at the bridge, is quite likely to have more to say in his own defense. It was actually urged in opposition to the Commission's proposal to abolish the bridge that any procedure which should make for a more deliberate hearing would involve much time and cause much delay! The Commission very wisely refused to give weight to any such extraordinary argument.

which adjoins the judge's seat, that he can hear only with difficulty what is being said against him. On certain days groups of offenders who have either pleaded guilty or who have been convicted by juries are brought up for sentence. The prisoner is stationed outside the farther rail of this enclosure and about thirty feet from the witness stand. The witnesses for or against him, who come to tell the judge matters intended to affect the extent of his punishment, go upon the witness stand and, talking within five feet of the judge, naturally raise their voices only sufficiently for his ears. It is physically impossible for the prisoner to hear anything that is said. The judge recognizes this and occasionally, but not often, raises his voice and tells the prisoner what some one has said against him to afford him an opportunity to explain or deny. Yet it is the statements of these witnesses which, substantially unheard by the defendant, influence and often control the judge in a determination of vital importance to the defendant, the sentence to be imposed upon him.

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The importance of giving a judicial dignity to proceedings in the police court cannot be recognized too soon, and the Commission very properly laid emphasis upon this matter. It would be unjust to say that none of the New York police magistrates have regarded this as essential. It is, however, fair to say that the majority of them, at least in the congested districts of the larger boroughs, for years have been running courts in which there has been no dignity, in which the crowd of persons standing around the judge's desk, talking to the clerk, talking to one another, or passing to and fro, has been such as to make the process of dealing out criminal justice resemble nothing so much as a bargain counter in a very dirty department store.

It would be unjust to place on the police judge the sole responsibility for the conditions in which he has in the past been obliged to do his judicial work. So long as the dignity and importance of his office are unrecognized, so long as mayors can be found who will make grossly unfit appointments to these benches for purely political reasons, of men mentally and morally unfit for any judicial office, so long as the city itself has so little regard for the surroundings in

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which justice has to be dispensed as to require buildings to be used for court purposes which are so dirty or dilapidated as to be a menace to health, we are not entitled to expect in them a high standard of justice, or even a reasonable show of dignity.

The Commission has shown clearly the need of large expenditures on new buildings and on repairs upon those which still can be repaired. There should be enough public interest aroused to induce the public authorities to spend the money which these improvements require. The legislation which has resulted from the investigations of the Commission will not compel the erection of decent court edifices, nor the building or renovation of places of detention for those accused of crime — that still remains for the city authorities. It is to be hoped, however, that the time is at last ripe when these conditions will be changed, when a Children's Court in New York City, for example, will be created in fact instead of in name, as a substitute for the very crowded old building which serves that purpose now.

The legislation which has resulted from the report of the Commission has, on the whole, been admirable. The laws relating to the courts of

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inferior criminal jurisdiction in New York City are now brought together in one definite enactment to take the place of a disjointed patchwork, the accumulation of many years of haphazard legislation. Those who are interested in this branch of law will no longer be embarrassed by an inability to find the law, a result in itself extremely desirable. The City Magistrates' Court, corresponding to the police court of ancient days, is now divided into two sections, the first division embracing Manhattan and the Bronx, and the second the rest of the city, each division consisting of sixteen magistrates and a chief magistrate. These magistrates sit separately in the various parts of the city. The old magistrates continue in office, their successors being appointed, as heretofore, by the Mayor. Several branches of this court are provided for, including a night court for men and a separate court of like character for women, and a so-called Domestic Relations Court, to be held in each of the boroughs of the city, in which all persons compelled by law to support poor relatives, persons charged with abandonment and non-support, husbands who desert their wives, and mothers who desert their children, are brought for trial.

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Provision is made for the handling of a large class of petty offenses, violations of the city ordinances, etc., without the unnecessary arrest of the person charged. This is done by legalizing a form of summons to be served by police officers upon the person charged with the offense, requiring his attendance at a police court to answer the complaint at some given time. The statute collects and improves the provisions relating to the probation of offenders, both of adults and minors. It forbids magistrates to be representatives of any political party on any executive committee or governing body of the party, thereby taking the "district leader" off the bench and stopping an ancient scandal by preventing the use of judicial power for political purposes. It requires separate places of detention of female and male prisoners and of youthful, less hardened offenders and older and more hardened offenders of the same class, and requires every cell or room adjacent to a court, used for the detention of prisoners or as a waiting-room for witnesses, to be kept in a sanitary condition. It definitely requires proper facilities to be afforded to every person arrested to communicate with his friends without, as heretofore,

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being subjected to the extortion of police officers and attendants. It directs a system of fingerprint identification of prostitutes in the night court for women.

Far more important, however, is the provision which the new law makes for a chief magistrate with broad powers, who is authorized by the act to assign the other magistrates to duty in the various branches of the court, to fix their hours, and supervise their work and their records. It is one of the most promising features of the new legislation. The position is one of great possibilities, and a chief justice of high administrative efficiency can accomplish much in reorganizing and improving the court.

These changes are all, no doubt, valuable. On another and equally important branch of the police court problem — the jurisdiction and powers of the court itself — there is much still to be done. The police judge prior to the new legislation had very little authority to impose fines or imprisonment, even for the pettiest offenses. Instead of largely increasing his power to impose summary punishment for offenses of the misdemeanor class, the only actual extension of power which the new legislation has pro-

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vided for is that which permits the judges to punish automobilists who are "first offenders," and persons cruel to animals. All other misdemeanor cases they "examine," hear both sides, and then, instead of deciding what punishment, if any, is to be administered, hold the defendant, if there seems to be enough evidence against him, for Special Sessions, a court presided over by three justices sitting together, where the whole thing has to be gone over *de novo* and judgment rendered. The Commission believed it advisable to maintain this system rather than to change it radically. Those who have seen in times past the present Court of Special Sessions in Manhattan at work trying to grind out the accumulated cases sent there from police magistrates' courts, running often from one hundred and fifty to two hundred cases a day, have seen a spectacle of the law's hurry, compared with which the law's delay seems trifling and unimportant. The system itself is entirely illogical and archaic, but, if it is to continue, the Commission has at least improved it by increasing largely the number of Special Sessions judges.

There is no scientific or logical reason for the existence anywhere of a system which either re-

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quires or permits cases involving petty misdemeanors to be heard on their merits and fully investigated by a judge, and which then forbids that judge to decide the cases which he has heard, but simply requires him to sift out those which merit retrial in some other court by three judges authorized to pass sentence. This duplication of labor is indefensible except on practical rather than scientific grounds. It makes for delay where promptness is indispensable. It is a procedure akin to the indefensible treadmill method in vogue in civil cases in the Justices' and Common Pleas Courts of Philadelphia, which are the subjects of bitter complaint from poor litigants. It is still more harmful in criminal than in civil law. This duplicate trial procedure not only makes for delay, but it imposes upon the complainant and his witnesses a double burden of spending two at least and often three days in court attendance in petty misdemeanor cases where one should suffice, and tends to discourage thereby complaints — a distinct disadvantage to the peace and order of the city. If, as has been urged, many of the police judges in New York are not to be trusted to exercise an actual judicial power, the Bench should be reor-

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ganized. Power, and not the mere appearance of power, should exist in that court.

The objection to such a court as this Court of Special Sessions is not to its personnel but to its theory. It is an anachronism. The judicial machinery of which it forms a part is unduly complicated and needs simplification. In mechanics a machine which provides two moving parts to do work which can better be done by one, if properly adjusted, lacks mechanical perfection. The same criticism is equally applicable to the relation between the police court and the Court of Special Sessions.

It is to be hoped that legislation may be adopted which will obviate some of these serious objections and will increase in some adequate way the authority of the police magistrate's court. The city does not get from that court to-day a fraction of the value which is potential in it. To develop that power would require the expenditure of money and intelligence, but it would be money and mentality well spent. The police judge, for example, is in a better position to check the lawlessness and corruption of the police than any other public authority outside the Police Department itself. The magis-

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trate is in contact with the policemen throughout every hour of the court day. He is, or should be, in a position to know more about police graft and oppression than any other public authority. Acting in concert with the police authorities, he can be of incalculable service in the reform of the Police Department, and in the stamping out of those grave faults for which it has become notorious.

We have statistics of labor regarding industrial accidents, the extent of unemployment, and other matters of kindred nature on which public information is important. Such data have been found useful for legislative purposes in the solution of our pressing industrial problems. Can there be any doubt that adequate statistics of crime would serve an equally useful purpose? Criminality, we are told, tends to increase in our American cities. Why? What are the crimes which tend to increase? What are the principal causes? From the police court, with properly kept records, this information could be obtained readily and put to good uses. Such information is of fundamental importance, if we are to cope with one of the great American problems—this problem of the increase of crime. Under

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the new law in New York the chief justice may require the collection by the magistrates of this statistical material.

The magazine press for the past few years has been filled with articles inveighing against the technicalities which defeat justice in our higher courts and by which guilty men have escaped and continue to escape justice. Conspicuous and serious as is this general defect in our system of criminal justice, however earnestly we may urge reform in that system at the top, the reform which can produce the greatest and most far-reaching results must begin at the bottom. A court in which annually in one city three hundred thousand persons are arraigned on charges of crime is, from this point of view, more important than the New York Court of Appeals, in which in the same time perhaps a hundred criminal cases are heard.

We are making the first rude beginnings of a system which looks to the reform, as well as to the punishment, of the offender. With the success or failure of this new institution the police judge has much to do. If he performs perfunctorily the function allotted to him by the probation law, if his interest in it is small, if the

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law itself is so framed as to leave him without necessary authority to assist in its operations, the serious criticisms of this system will continue.

That there is much yet to be done in thus coördinating the work of the police magistrate with that of the forces interested in the reform of the offender, a recent event and a new section of the law both bear witness. During the progress of the so-called "shirt-waist strike" one of the New York City magistrates, who has been on the bench for years, sentenced a number of little girls to the workhouse on Blackwell's Island for disorderly conduct in their work as pickets in this strike. The propriety of these sentences was seriously criticized at the time, and some of the philanthropic ladies who became interested on the side of the strikers visited the island to see what the conditions and associations were in which these decent working-girls had been placed by the magistrate's action. A report of what they saw there was published in the daily press. Later, in passing upon the cases of other young girls brought before him on a similar charge, the magistrate was reported to have expressed himself as shocked at these revelations of the conditions of the workhouse,

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and to have stated that he had not realized what the effect of his sentence had been or the moral dangers to which he had exposed these girls. One of the new laws which has resulted from the work of this Commission expressly requires the magistrates *once a year* to visit the places to which they commit prisoners.

Some time far in the golden future students of the history of social salvage, delving in the musty records of the past to trace the slow upward movement through which American criminal law shall have developed its constructive power, will find this statute and tell an incredulous public that there was a time long ago when the welfare of the criminal and the condition in which he was restored to society were considered of so little importance that such a statute was found necessary.

We need somehow to get, if we can, a different attitude toward the police court. Most of us have read so many stories of its tragedies and comedies in the magazine press that it is hard for us to realize that it is a court and not a theatre. It is a vital court, its effects incalculably far-reaching; and when in the public mind the importance of prompt and efficient justice

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at first hand becomes of primary, rather than of secondary, importance, when we begin to realize that respect for law has to be generated first, and especially in the courts where the people themselves in the largest numbers come in direct contact with it,—when we realize these things, and not till then, will the police court in our great cities become what it should be—a court adequately equipped, decently housed, and presided over only by judges both capable and willing to perform the functions imposed upon a highly responsible branch of the judiciary. If the work of the Commission has helped, even in a small degree, to bring about this needed change in public opinion, it will have justified its existence. We are in the era of preventive medicine. It is time that we arrived at the period of preventive law.

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VIII

Punishing Corporations

VIII

Punishing Corporations

WITHIN the past few years numerous fines have been imposed by Federal judges upon railway and other corporations for violations of the Interstate Commerce Act in granting or receiving rebates forbidden by that law. The Standard Oil Company of Indiana has been fined twenty-nine million dollars. Other railway companies have been fined smaller amounts, but sums sufficient to cause an appreciative effect upon dividend funds. As these fines have been imposed, protest has been made in the public press against the policy of the law which the fines express — the policy of punishing the corporation, and thereby in effect punishing a large body of stockholders innocent of any personal share in the offense for which their company has been found guilty.

The critics whom these fines have aroused insist that the fines are unjust and that the law under which they are imposed is illogical and wrong, first, because it punishes the innocent

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stockholder by making him suffer financially for the criminal conduct of the officers of his company — conduct which it is not to be assumed he has ever authorized ; and, secondly, because the officers whose actions result in these killing decrees often go unwhipped by the law against which they have offended. These critics demand a complete change in the law, a change by which the stockholder shall go free and the offending officer alone shall be punished.

The pathetic figure of the poor widow stockholder is, of course, familiar to our lawmaking Solons. However much her rights may be trampled on or disregarded in directors' meetings, they are always rehabilitated and revived for active service when legislative action seems to threaten the interests of the corporation in which, for legislative purposes at least, she has her small savings of a lifetime invested. The complaint against the punishing of corporations comes in part, of course, from the fickle and uncertain friends of the widowed stockholder, but a substantial part of the criticism comes from sources less open to suspicion — from thoughtful and disinterested critics who insist that the criminal law should find its mark in an offending person

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rather than in an unoffending property, and who say that the law should recognize that corporations are only forms and fictions, capable of neither good nor evil except through the individuals who act through and under them.

They say that by creating personal responsibility of these individuals for criminal acts done by them as corporate officers, and by punishing that wrongdoing, all proper reforms in corporate management can be accomplished, and that the punishment of the fiction, the corporation itself, is undesirable as well as unnecessary and unjust.

The argument from innocence — the argument that by reason of the stockholder's own non-participation in the wrongs committed by corporate officers in his behalf, his property, the corporation, should go free — is not a new one. Moreover, it has not proved in the past a strong argument before the courts. It has often been raised. Twenty years ago, in a memorable litigation — the celebrated Buffalo case — this defense was pleaded in New York by the Standard Oil Company. It was charged by the Lubricating Oil Company of Buffalo with having conspired to ruin that company by circulating falsehoods, by representing that its oil was of inferior quality,

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that it had no right to make or sell it, by threatening its customers with lawsuits and expenses if they continued to buy its oil, by asserting that its lubricating oil was made by infringing patents, and that all who bought that oil would be sued for such infringements. It was further charged that the Standard Oil Company of New York, and other allied corporations belonging to the Oil Trust, had employed a certain individual to make a business of circulating these and other alleged slanders among the Buffalo company's customers in an effort to ruin it.

Before entering upon an answer to these charges which placed in question the truth of these accusations, the Standard Oil Company urged that even if true they would constitute no basis for a claim against the Company itself. It said in effect :—

Assuming these charges to be true, you still are not entitled to sue us. We are a corporation, and our innocent stockholders are not responsible for slanders circulated against you even if done through the instigation of our officers. It is against the law to circulate slanders, and corporate officers have no power to authorize for the stockholders or the company the performance of such illegal acts. Therefore this company and its stockholders cannot be legally bound by what these

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officers or their agents illegally have done. You may sue the agent who circulated the slanders, you may sue as an individual any officer of this company whom you can show actually to have employed this slanderer so to misconduct himself, but the corporation must go free. Its innocent stockholders have been guilty of no offense, and have authorized none to be committed in their behalf.

What the practical consequence of this plea would be is, of course, apparent. The argument for personal as opposed to corporate responsibility for wrongdoing could not be more skillfully advanced than it was in this case, but the argument failed. The Court declared that while the alleged agent would be legally responsible personally for his conduct, if it should appear that he had been employed for the purposes charged the corporation would be responsible as well, under the old general rule that "for the acts of a servant within the general scope of his employment while engaged in his master's business, and done with a view to the furtherance of that business and the master's interests, the master will be responsible, whether the act be done negligently, wantonly, or even willfully."

There is great justice and fairness in this rule [says the Court], otherwise injustice might be done to indi-

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viduals if their remedy for wrongs authorized by corporations were to be confined to actions against the agents employed by the corporation. Since in these times a vast portion of the business of the country is carried on by corporations guided and stimulated in their action by the advice and under the direction of shareholders who desire to make their investment profitable, this rule should not be narrowed or limited in any degree by the decisions of the Court.

There has been little tendency among the courts, in the thirty years which have elapsed since this decision was made, to restrict or create exceptions to the rule quoted. On the contrary, the wisdom of extending its principle has been recognized, in civil as well as in criminal proceedings.

For example, years ago one of what the lawyers call "leading cases" on corporate responsibility was a decision which declared that a street railway company was not liable for an assault committed in a fit of anger by a horse-car driver upon a female passenger by throwing her from a moving car. The decision is no longer law, and under contemporary decisions railway companies have been held responsible in damages not only for such assaults, but even for insulting language used by employees to passengers on

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the company's cars. No one can question the public benefit which must flow from this increase of responsibility. The theory which would hold only the offending person responsible for such acts would find itself practically nullified by the financial irresponsibility of the person whose individual conduct is involved. The uselessness of suing an abusive or violent car-driver is of course apparent. Putting the fellow in jail might be some satisfaction to the injured citizen, but this remedy would still be inadequate as an incentive to induce the corporation to prevent a repetition of similar offenses by other employees.

Much more satisfactory results have been and are obtained by creating a legal responsibility which for very practical financial reasons makes the corporate employer solicitous of the equable temper and general character of the men it hires to serve in its public conveyances. It is doubtless true that the stockholders of street railway companies who through their chosen officers have hired a car conductor have presumably not hired him to assault or abuse passengers, any more than the stockholders of steam railway companies are to be presumed directly to have author-

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ized or enjoined their officers to break the law by giving illegal rebates to shippers. The purpose of the law, however, is to lay down not abstract but enforceable rules of conduct, and the judicial reasoning which involves the corporation in responsibility for the acts of the agent seems as applicable in one case as in the other.

It may be urged that this argument does not afford a complete answer to the objections to punishing corporations. It may be said that, even conceding in sundry instances that it has been found advantageous in civil cases to hold corporations responsible for wrongs done by their agents, after all this is a rule of hard practical necessity, of public policy rather than of justice. There are, for example, those to whom the legal maxim of *respondeat superior*—the rule which makes the employer responsible for wrongs done by his agent—is a rule not of morality but of law. As the president of a New York corporation employing a large number of delivery wagons expressed this thought:—

The law says we are responsible for damages done by our drivers in carelessly running over people. Now, we are as careful in selecting our drivers as we can be. I think when we have done that, we have fulfilled our

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entire moral responsibility. If the driver is careless and runs over some one, I think we are only legally and not morally responsible, and if I can get out of that responsibility in any decent fashion and protect my stockholders from being mulcted in damage suits, I think I am justified in trying to do it.

This attitude towards corporate responsibility and more especially towards corporate crime of the kind here considered overlooks its essential character. The type of offense for which corporations are properly punishable as corporations is not personal in its essence at all. Such offenses are committed by individuals, to be sure, but not to secure individual or personal advantages, but solely to secure impersonal and corporate benefits. The thing aimed at by the Interstate Commerce Law and other similarly framed statutes is essentially corporate wrong doings—criminal profits or criminal economies. Here is a railway company, for example, giving rebates. These rebates are given by agents or officers who are acting for the supposed benefit of the railway company in increasing its business with large shippers, or in inducing shippers to give traffic which would otherwise be diverted to competing lines. The officer derives no personal advantage from the

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rebate. If by his conduct the railway receives a benefit, it is a corporate advantage and redounds to the profit of the stockholders. If, however, the illegal conduct is discovered by the officers of the law, who should be punished? The answer given by those who disbelieve in punishing corporations is this: "Punish the traffic manager, put him in prison when his wrongdoing is detected, and through fear of like punishment his associates or his successors will desist from their evil doing."

From the standpoint of the stockholder this is indeed a comforting doctrine. Under it the risks and penalties are all for the offending railway officers. The profits from the misconduct of those officers are all for the corporation itself and its stockholders.

The trouble with this doctrine is that it seems to ignore everything essential to the offense which the law wishes to stamp out. Rebating existed because it was, or at least was deemed to be, a profitable thing for the railway. If the practice becomes over-hazardous by reason of law aimed, not at some unessential agent, but at the profit itself, the rebating will stop. The indignation of stockholders at the heavy fines which in recent

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years have been imposed upon railways guilty of frauds on fair trade has found vent not only in loud outcries against the raiders of their prosperity in the Federal Department of Justice, but against the corporate officers and directors whose conduct has produced these calamities.

The circular letters to stockholders which the presidents of these railway culprits have seen fit to send out to mitigate the indignation of their stockholders are distinctly healthy signs. These circulars berate the Federal Department of Justice and the Federal courts in good round terms, and assure the stockholders that the convictions and the fines imposed resulted from hair-splitting technicalities or abuse of power. Whether these explanations really succeed in explaining, whether the stockholders are fully convinced that the enforcement of law is properly described as a raid on prosperity, is, so far as the public is concerned, comparatively unimportant. The stockholders are at least agreed on one thing; that is, that they want no more fines and they want their officers so to direct railway business that there shall be no more fines. By these much-discussed legal proceedings, what for lack of a better term may be called the moral influence

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of the stockholder has been aroused against the rebate.

What has been said here about the rebate fines is of course by way of illustration merely in the discussion of a principle. The policy of punishing corporate bodies for corporate wrongdoing is based upon the recognition of the fact that under modern conditions there may be impersonal and corporate crime which is best attacked by an assault upon the underlying motive for which the offense is committed. If an illegal corporate profit is made extra-hazardous, it will be abandoned because good business requires it. If an economy, for example, in construction and maintenance or in operation consists in a failure to take decent precautions for the safety and comfort of the traveling public or for employees, and this economy is rendered of doubtful value because of the reasonable prospect of a substantial money penalty, the economy will be abandoned. If, however, that penalty be slight or the prospect of its infliction be remote, the illegal economy will continue.

The workings of the Free Transfer Law in New York afford an illustration on this point. The law required the issuance, by the great

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street railway system of that city, of countless thousands of free transfers from one line to another at points of intersection. The company refused to obey it at many of these intersections. The law provided a penalty of fifty dollars for each refusal, recoverable by the person to whom the transfer was refused. Many suits resulted. A class of lawyers conceived the idea of bringing these suits by wholesale. Their "clients" were instigated to travel daily in blocks of five on these cars; to demand the transfers where the law required them to be issued; and on being refused, subsequently to bring suit for the lump amount of penalties which the law afforded for these refusals.

By a construction of the statute to which is given a meaning quite different from its apparently plain wording, the Court of Appeals put a stumbling-block in the way of this highly questionable form of activity on the part of the local bar, and reduced their business from a prosperous wholesale to a meagre retail trade. The railway company, encouraged by the decision, continued, where it chose, to break the law and to refuse the transfers. It found it more profitable to collect innumerable illegal nickels from the

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traveling public and to pay an occasional litigant the penalty which the statute provided. The law had failed to make an illegal profit uneconomical. If, however, the Court had been able sufficiently to overcome its disgust at the very questionable business methods of the professional transfer travelers so as to decide the test case in their favor, the railway would have found it cheaper to obey the law, and the public would have profited accordingly.

Those who now are urging the punishment solely of persons for what are really corporate offenses seem to overlook not only the essential nature of the offense, but certain practical as well as ethical difficulties in their position. One is the great difficulty for outsiders to locate in the network of corporate management the offending person who should feel the whip of the law. Oftentimes responsibility seems to be divided into infinitesimal segments in the operation of a corporation, so that the indictment for wrongdoing of one man for the conduct of a great business system seems monstrous. Before we can hope to find the individual responsible for corporate criminality we must have a reorganization of corporation law which shall

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enable us more clearly to locate the actually responsible person. It seems rather a cowardly method of reforming corporate abuses simply to add to the legal responsibility of minor officials and employees in the service of these organizations, and to expect to make corporations honest by the terrors of jail thrust before office managers and bookkeepers. It is not necessary or proper, on the other hand, that these individuals should be relieved of all responsibility. But to place the whole burden on their shoulders is surely indefensible. To fill the jail with these subordinates can accomplish no real reform, for that reform must begin at the top and not at the bottom.

Some years ago, a nervous, middle-aged gentleman, who was a heavy stockholder in a great railway system, was traveling on it from New York to Chicago. At one of the stops which his train made, he left his coach, sought the engine cab, and in a very vehement fashion took the engineer to task for violation of rules. "Since our last stop," he said, "you have passed at full speed three signals where the rules require you to slow down. Don't you know, sir, that if we had met with an accident, and you were not

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killed yourself, you would probably be sent to jail for manslaughter?" The engineer took the scolding calmly. "You missed one," he said. "There were four of those slow-down signals. I mind them when I can, but this time I am late. You talk about the rules. Why, if I slowed down at all these signals, it would take twelve hours more to get to Chicago, and I might be discharged as soon as I got there. In my job there is only one real rule, and that is to keep the running time. You are right, though," he added grimly, "about my going to jail for manslaughter. That's what the slow-down signals are for — to put it up to me in case anything happens. Jail chances are part of my job."

To increase indefinitely the number of jail chances which shall be part of the job of employees and agents of corporations is far from an attractive proposition to fair-minded men when its real character is understood. It is only just to assume that those who advocate jail sentences as a cure for the criminal conduct of corporate affairs mean that the individual culprits shall not be catspaws, not minor officers, clerks, and employees, but the dominating and directing men inside. This programme pleases the

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ear, but it is really, under present conditions, no practical programme at all. American corporation law has not yet been formulated with any clear purpose of fixing and localizing corporate responsibility, but rather of dissipating or concealing it. The perennial problem of the farmer at the fair—that of selecting from the three shells the one containing the little pea—is in miniature the problem of the police power of the State in the presence of corporate wrongdoing. The State is the puzzled farmer confronting not three but a myriad of shells; and, carrying the analogy a little further, it seems strange that so few of the friends who advise the farmer to seize boldly the vanishing pea, ignoring the embarrassment created by the shells, have had so little to say about the advantage of having less opacity in the shells themselves.

Punishing individuals for corporate offenses against the public will remain a doubtful and uncertain expedient until corporation laws have been remodeled. That work has not yet fairly begun. Criticism of existing corporation statutes is still regarded in conservative quarters as synonymous with attacks on property and on prosperity.

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What has been said in favor of the principle of punishing corporate bodies does not involve a defense of all the absurd travesties upon that principle embodied in statutory enactments of State legislation in the past few years. It is not necessary to disagree with those who find in many of these anti-railway and anti-corporation statutes a disheartening and disgusting spectacle of self-destroying demagoguery. It is doubtless true that a good part of the more conspicuous recent State railway legislation seems to proceed upon the theory that a railway is essentially a public enemy and an outlaw, having no rights or property entitled to constitutional protection through the courts. But the fact that these and many other anti-corporation laws impose grossly excessive, unnecessary, and unreasonable fines upon corporate bodies, and that the principle of punishing corporations for corporate offenses is a dangerous weapon in the hands of the legislative charlatan and the demagogue, falls far short as an argument, and fails to offer conclusive proof of the essential fallacy of that principle. It is no argument against medicine that quack doctors give it in overdoses.

The scope of this remedy may not be as broad

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as the whole field of corporate offenses. It is not to be claimed that corporate bodies should be punished in every instance for every offense committed against the public by officers or employees acting in their behalf. The argument which is here offered is simply an attempt to meet the criticisms of those who allege that the principle of punishing the corporation has no just basis whatever, and is essentially and in all respects wrong. It is not necessary to insist that the remedy for misconduct of corporate officials should in all cases be the use of the rod upon the corporation itself. It may, indeed, be the part of wisdom in many cases to mete out substantial punishment to the official as well as to the company in whose interest he misconducts himself. The whole point is that the principle of punishing corporations has, under present conditions at least, the right to live.

It may be that, considered as a policy, it is not a permanent but a transitional one. It may be that, by the reorganization of American corporation law, individual responsibility for corporate conduct may be made clearer and better defined, and the connection of the real owners of corporate property with its actual management

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shall be made less capable of concealment, and a practical method thereby afforded to stockholders of obtaining from them reimbursement to the corporate treasury for fines and penalties which in the first instance the corporation has been compelled to pay for official malfeasance. When such reforms have been made, we may then consider the advisability of making the offending individuals alone responsible for corporate misconduct, and of abolishing the responsibility of the corporation itself. In the meantime, however, no single influence, where strong influences are most needed, is likely to have greater cogency in urging on that reform in corporate organization than the one here considered. Until that reform has taken place the principle of punishing corporations will have its legitimate place in the armory of the law.

IX

The Law and Industrial Inequality

IX

The Law and Industrial Inequality ¹

HAS the State ever a clear duty to lend a hand to aid those who are obviously at a disadvantage in struggling with the forces of modern industry? Under our fundamental law and the principles declared in our Constitution, can our legislatures and courts recognize not only the facts of existing industrial inequality between men, but a duty to protect by law framed to meet new conditions the weaker against the stronger? When individual action alone cannot secure equalization of the conditions of competition, and where that failure is resulting in misery and distress, may the law intervene to protect the weak from the tyranny of the strong? Are the handicaps of life to be questions solely for the individual, or are they at times and under special circumstances to be questions for the State itself to grapple with, and if not to solve, at least to create condi-

¹ A paper read before the New York State Bar Association at its Annual Meeting in 1906.

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tions under which the individual may solve them for himself?

These are difficult questions which our courts with increasing frequency are being asked to answer when required to determine the validity of laws which our legislatures and Congress are yearly enacting; laws regulating or fixing the conditions under which industry shall be carried on; limiting the hours of labor of women and children, and men as well, in over-competitive employments; laws aimed to reduce unnecessary dangers to life and limb in dangerous trades or dangers to health in unhealthful occupations; laws which, by increasing the employer's responsibility, seek to urge him to new diligence in the protection of his employees; laws which in a multitude of ways aim to control or regulate as special necessity may dictate the processes of industry, to remove conditions which press too heavily upon the overburdened, and which, uncontrolled, sap vitality and destroy or shorten life.

The general problem which these questions raise and which involves both the power and the duty of the State would seem to have been answered, in all the great civilized countries of the

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world but ours, in the affirmative. Many of these questions were settled in European countries long ago. Economic conditions which gave them urgency earlier in the Old World have more recently come to us and the form of the problem which these new conditions have raised as it is presented to our country is — How far may the legislatures go in enacting laws aimed at conditions of industrial inequality under the limitations of the law of the land?

Our fundamental law has for one of its principles that of equality — that before the law, men are equal in rights, privileges, and legal capacities. It has for another principle, individual freedom, the right of the individual, uncontrolled by any arbitrary trammels of the State, to pursue any proper calling and to contract with others in relation to that calling. The liberty to pursue such calling is a property right, is a part of the liberty and property which shall not be taken away without due process of law.

History would seem to show that for the first seventy-five years at least of our national life individual liberty was the dominant note. We were opening a new world. In it there were ap-

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parently innumerable opportunities for individual enterprise and initiative. Our national life began, moreover, with greater industrial equality than had before existed in any other country. The industrial revolution had not yet begun when American independence was declared. We were then an agricultural people, for England, hoping to keep us a market for her manufactures, had forbidden the export of machinery to her colonies. The spinning machinery of Arkwright was not brought to us until after the war. The power loom was not invented until 1785. There was not a factory in the United States when the Constitution was adopted. The artisan was his own master and worked with his own tools or on simple machinery which by moderate savings he himself might own. There were no great fortunes in the modern sense, no great corporate organizations of wealth, no factory system. Is it to be wondered at, that, beginning thus with such a marked general condition of industrial independence amid a wealth of natural opportunities for personal success, our law should for so long have kept dominant the idea of individual personal freedom? Is it strange that, in the pursuit of individual fortune, the in-

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terests of the State were often neglected, or that opportunities for unjust advantage conferred by unjust law on the few, or seized by them in spite of law, failed to receive general public interest among citizens too much absorbed in their own personal affairs to be aroused by the abuse of the powers of the State?

With the passage of time, however, with the industrial changes which have made an agricultural colony a power in the markets of the world, have come changes in our attitude towards the law, changes produced largely by economic variations. The modern note is not simply individual freedom ; it is social freedom ; not freedom from law, but freedom by law — and in that freedom equality of opportunity. Along with the tardy legislation which aims through law to repair the oversights and blunders of the past and restore, so far as may be, that equality of opportunity, which seeks to take away privilege and unjust enrichment, to prevent transportation discriminations and to reduce the advantages in competition of fraud over honesty, comes legislation of another kind which aims at the industrial welfare of the many by limiting the individual freedom of the few ;

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by imposing new duties on the strong for the protection of the weak.

The greater part of this protective legislation must find its justification, if at all, before the courts, through the police power. The old theory of legal equality, based upon the existence of industrial equality, finds itself in conflict with the facts of life. Unless the State must admit itself powerless to deal with new conditions of modern society, authority must be found in the police power to meet their demands for law. The constant expansion of that power in the last fifteen years, as expressed in legislative enactments and in the increased bulk of decisions sustaining these enactments, seems to indicate an almost conscious purpose of society, constrained by its own necessities, to limit the range of individual freedom. This growth of the police power is one of the marked features of modern American law.

It is with great wisdom that the courts have refrained from defining the police power, lest it crystallize by definition and lose its capacity to expand. In it is contained the reserved right of the State to preserve its own growth, to make provisions for new conditions as they appear.

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It is the law which must find its authority in the needs of the present and not solely in the traditions of the past. It is because that law is so obviously in a state of evolution that the courts have refused to say where the constitutional boundaries limiting its exercise are to be fixed.

As a part of the expansion of the police power the courts have declared in a number of cases the right of the legislature to enact laws not only for health, safety, or morals of the general public, but for the protection of individuals whose condition gives them special need of legal protection or whose individual freedom has lost in a measure its reality through economic pressure. Industrial inequality is being recognized as a justification for the exercise of the police power in aid of the health, safety, and well-being of citizens suffering from its burden. In *Holden v. Hardy*, 169 U. S. 366, the case in which the United States Supreme Court upheld the constitutionality of the Utah Eight-Hour Law for underground miners, the Court, after considering at some length the conditions injurious to the health in the miner's occupation, observes:—

The legislature has also recognized the fact, which the experience of legislatures in many States has cor-

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roborated, that the proprietors of these establishments and their operators do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength; in other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide and the legislature may properly interpose its authority. . . . The fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality or where the public health demands that one party to the contract shall be protected against himself. The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and where the individual health, safety, and welfare are sacrificed or neglected, the State must suffer.

The same Court more recently in *Knoxville Iron Company v. Harbison*, 183 U. S. 13, was called upon to test the validity under the Fourteenth Amendment of an Act of Tennessee requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due employees.

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In upholding the law the Court quoted with approval the decision of the Supreme Court of Tennessee : —

The legislature evidently deemed the laborer at some disadvantage under existing laws and customs, and by this act undertook to ameliorate his condition in some measure by enabling him or his *bona fide* transferee at his election, and at a proper time, to demand and receive his unpaid wages in money rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employee upon equal ground in the matter of wages, and so far as calculated to accomplish that end deserves commendation.

How great the industrial inequality must be, how far the worker must be unable to protect himself to justify police legislation for his betterment, are still open questions. But the courts have declared that the State may act to protect women and children against excessive labor ;¹ that it may provide regulations for greater safety and comfort of factory and railway employees ;² that it may change the common law and take away defenses in actions for personal injuries

¹ *Wenham v. State*, 65 Neb. 394, 91 N. W. 421; *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383; *State v. Buchanan*, 29 Wash. 602.

² *People v. Smith*, 108 Mich. 527; *State v. Whitaker*, 160 Mo. 59; *State v. Nelson*, 52 Ohio St. 88.

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which heretofore existed ;¹ that it may in certain cases limit the hours of labor of men ;² that it may regulate to a certain extent the terms and conditions under which employees shall be paid for their services, and prescribe how they shall be paid.³

That there is often great disagreement between judges as to the limits of the police power in protective or regulative legislation of this kind, goes without saying. The State courts often flatly contradict one another both as to their own powers and as to the policy of the courts. Compare, for example, *People v. Havnor*, 149 N. Y. 195, upholding a Sunday-closing law for barbers, with *Ex Parte Jentzsch*, 112 Cal. 468, both cases being decided in the same year, 1896. The California courts indignantly repudiate any power on the part of the legislature to take away from the barber his constitutional right to work all day on holidays and Sundays, and declare

¹ *Ry. Co. v. Mackey*, 127 U. S. 205; *Tullis v. Ry. Co.*, 175 U. S. 348; *Minn. Iron Co. v. Kline*, 199 U. S. 593.

² In mines: *In re Boyce* [Nev.], 75 Pac. Rep. 1; *State v. Cantwell*, 179 Mo. 245; on street railways; *re Ten-Hour Law for street railway corporations*: 24 R. I. 603.

³ *Knoxville Iron Co. v. Harbison*, 183 U. S. 13; *St. Louis, etc., Ry. Co. v. Paul*, 173 U. S. 404; *Hancock v. Yaden*, 121 Ind. 366.

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that to sustain such a law would be to send the barbers from the prison to the poorhouse ! In spite of the numbers of decisions which have been rendered, the question of what are the limits of legislative regulation or control of industry through the police power, is still an open one. The courts have adopted no general policy, and it is fortunate that they are not obliged to adopt one.

The validity or invalidity of protective laws of this character is ordinarily a question for the State courts, and to be determined with reference to State Constitutions only. Such is the view which the Supreme Court of the United States has taken almost uniformly in construing exercises of the police power by State legislatures. Numerous State laws of this kind have been tested in the Federal courts to determine whether they violate the Fourteenth Amendment and its sweeping provisions forbidding the States from abridging the privileges and immunities of citizens of the United States or denying them the benefits of due process or equal protection of the laws. That Court has repeatedly declared that the police power was reserved by the States at the time the original Consti-

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tution was adopted,¹ and that the Fourteenth Amendment does not impair its authority.²

In *Holden v. Hardy*, Judge Brown expresses the non-intervention policy of the Federal courts and its reason. After reviewing changes by legislation which States have made in the past, he observes : —

An examination of both classes of these cases under the Fourteenth Amendment will demonstrate that in passing upon the validity of State legislation under that amendment this Court has not failed to recognize the fact that the law is to a great extent a progressive science ; . . . that restrictions which had formerly been laid upon the conduct of individuals or of classes or individuals had proved detrimental to their interests, while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, had been found to be in need of additional protection. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so con-

¹ *Mugler v. Kansas*, 123 U. S. 623.

² *Barbier v. Connolly*, 113 U. S. 27.

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strued as to deprive the States of the powers so to amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare, without bringing them in conflict with the supreme law of the land.

The broad scope for legislative action which is thus assured the States is apparent from this and other cases in that Court.

As the Court says in *Gundling v. Chicago*, 177 U. S. 183:—

Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities in the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.¹

This general attitude of the United States Supreme Court is important in view of the tend-

¹ See also *Patterson v. Kentucky*, 97 U. S. 501; *Barbier v. Connolly*, 113 U. S. 27; *Jacobson v. Massachusetts*, 197 U. S. 11; *Minnesota Iron Co. v. Kline*, 199 U. S. 593.

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ency of the State courts, when holding statutes of this kind to be unconstitutional, to make the Fourteenth Amendment one of the grounds for their decision. No appeal lies to the United States Supreme Court from such decisions, and when the State court bases its ruling on this ground, amendments of the State Constitution can afford no remedy. The State courts ordinarily are more sensitive to infractions of the Federal Constitution than the Supreme Court itself. The New York Court of Appeals, for example, nullified under the Fourteenth Amendment the Eight-Hour Law on Public Works.¹ No further appeal remained for those interested in sustaining the validity of this law. Shortly after this, however, the United States Supreme Court, in a case involving a similar statute,² held that its constitutionality was beyond all question. Not infrequently when the Federal question is thus removed, State Constitutions are amended to permit legislation for which there is strong popular demand. In Colorado, before the decision of the United States Supreme Court in *Holden v. Hardy*, sustaining the Eight-Hour

¹ *People v. Orange County Construction Co.*, 175 N. Y. 84.

² *Atkin v. Kansas*, 191 U. S. 207.

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Law for miners, the State court had advised the legislature that a proposed law of the same order would be unconstitutional under the Fourteenth Amendment as well as under the State Constitution.¹ Thereafter when the Supreme Court had disposed of the Federal question in *Holden v. Hardy*, the Legislature enacted a similar law which the Colorado courts held to be unconstitutional, but solely under the State Constitution.² Thereafter (as in New York, after the decision of *Atkin v. Kansas*), the Constitution of the State was amended to permit the legislation desired by the people.

In Illinois a decision³ declares unconstitutional a law prohibiting more than eight hours a day or forty-eight hours a week for the labor of women in factories. Its reasoning is based on the Fourteenth Amendment and upon the State Constitution. The decision is generally regarded by writers on the police power as erroneous so far as the Fourteenth Amendment is concerned, and *dicta* in subsequent decisions of the United States Supreme Court leave little doubt that the Federal question would have been otherwise

¹ *In re Eight-Hour Bill*, 21 Col. 29.

² *In re Morgan*, 26 Col. 415.

³ *Ritchie v. People*, 155 Ill. 98.

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decided by that Court, but, with the decision of the Illinois Court placed squarely on the Federal Constitution, it is obviously a fruitless task for those interested in the protection of women in industry to attempt to change the Illinois Constitution.¹

The only recent decision of the United States Supreme Court on legislation of the character

¹ Subsequent events in Illinois illustrate the point suggested in the text. In 1892, Illinois by its Supreme Court declared, as stated, that the Eight-Hour Day Law for women in factories took from them life, liberty, and property without due process of law, as forbidden both by the state and national constitutions. There being no appeal allowable to the United States Supreme Court, nothing was done or could be done in Illinois to obviate the decision. It created an *impasse*. Years later, Oregon held a similar law to be constitutional. It was appealed to the United States Supreme Court and was sustained (*Muller v. Oregon*, 208 U. S. 412). Thereupon the Oregon law was enacted in Illinois. The law was again tested in that State and held unconstitutional by a lower court, and in 1909, held constitutional by its highest Appeal Court. This first decision in 1892 had absolutely prevented any law limiting the hours of working-women in Illinois for seventeen years until the happy accident of the Muller case made this change possible. One of the most important law reforms advocated by the American Bar Association is one by which an appeal shall be permitted to the United States Supreme Court from all judgments of the highest court of any State declaring a State statute unconstitutional as violative of the Federal Constitution. Such appeals cannot be taken now, thus creating conditions such as that just described. Such appeals can only be taken under present law when the highest State Court has decided in favor of the statute attacked, not when it has declared it unconstitutional.

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herein considered in which the act in question was found to be unconstitutional is *Lochner v. New York*, 198 U. S. 45, involving our law limiting the hours of labor in bakeries to sixty per week or ten hours a day. This decision was concurred in by a bare majority of the Court and is narrow in its scope. The Court refuses to consider the act as one passed for the health of bakers. It construes the law as one "the real object and purpose of which was to regulate the hours of labor between master and employees (all being men—*sui juris*) in a private business not dangerous in any degree to morals or in any real or substantial degree to the health of the employee. Under these circumstances," it says, "the freedom of the master and servant to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the Federal Constitution." It must be admitted that if followed in subsequent decisions the authority assumed in this case over the exercise of the police power by the state legislatures will tend very materially to diminish the powers of legislatures to make laws for conditions within their borders requiring, in their judgment, in-

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dustrial legislation. If I may venture a personal opinion, it is that the decision is a reactionary one which will not be enlarged beyond its immediate facts in subsequent rulings. The facts themselves which the Court finds as a basis for its decision, regarding the general healthfulness of the baker's occupation, are themselves contrary to the conclusions of modern investigators who have found the occupation to be one of unusual unhealthfulness and of extraordinary mortality.

The United States Supreme Court has usually, in reviewing exercises by the state legislatures of the police power, been influenced by a reflection well expressed by Justice Harlan in *Atkin v. Kansas*, 191 U. S. 207, at p. 223, where he says :—

No evils arising from such legislation could be more far-reaching than those which might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation and upon grounds merely of justice and reason or wisdom annul statutes that had received the sanction of the people's representatives.

The extent to which the police power of the State shall expand to meet economic and social

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conditions, depends, of course, largely upon the attitude of the judiciary. The judicial policy, as expressed in the courts, has ordinarily been against fixing upon the police power rigid rules. As the Supreme Court of Nebraska has said in a decision sustaining an act limiting the hours of women in mercantile establishments :¹—

We are unable to find a case where the courts have laid down any rigid rule for the exercise of the police power. There is little reason under our system of government for placing a narrow interpretation on this power restricting its scope so as to hamper the legislature in dealing with the varying necessities of society and new circumstances as they arise calling for legislative intervention in the public interest. The moment the police power is disturbed or curbed by fixed or rigid rules, a danger will be introduced into our system which will be far greater than the results rising from an occasional mistake by legislative bodies in exercising such power.

An objection often heard to legislation of this kind comes from those who deny that ethical gains can come through legislation. They say, and it is undoubtedly true, that the courts and the legislatures can by no actions of theirs destroy human selfishness or rapacity. If, in the rush

¹ *Wenham v. State*, 65 Neb. 394 [1902].

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for wealth, standards of national honor have been lowered, if we have canonized capital instead of character, if all this be true (and I do not believe it to be true,) then we cannot change the moral fibre of dishonest men by legislation. But admitting all this and that the law cannot transform the character of the avaricious and cruel, even the most conservative of us must admit that it can, if the limitations of our law will permit, create conditions under which men who are willing to conduct business on a plane higher than that of mere dollars and cents, shall not be ground down by competitors willing to oppress the lives of others to make trade profits.

The danger is more imaginary than real that the intervention of the State in industry would, under a broad construction of the police power by the courts, be too frequent; that individual initiative would be cramped by unnecessary and unreasonable restraints, that handicaps would be placed upon legitimate competition by this type of legislation. Our legislatures, for example, have almost uniformly listened with strained attention to the representatives of great business interests, even when they have opposed the most

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reasonable limitations on their powers, the most righteous extensions of their duties and liabilities. We are to-day, for example, behind all other great civilized countries of the world in the protection which our law affords the safety of employees. Such protective laws as have been upheld as to their constitutionality have been almost invariably strictly construed by the courts against the purposes of the legislature. Take a single illustration. In 1847 England adopted as a part of her factory act a provision requiring guards to be placed upon dangerous machinery. It has enforced that law. Forty years later New York adopted substantially the same statute. Her courts, however, have practically nullified it.¹ Our law, as regards responsibility of employers for industrial accidents, is generally regarded by the learned text-book writers as unjust in important particulars and unsuited to our time. Yet how slowly, how unwillingly have

¹ Compare *Knisley v. Pratt*, 147 N. Y. 372, with *Baddesley v. Lord Granville*, 19 Q. B. D. 423; *Simpson v. N. Y. Rubber Co.*, 80 Hun, 418, with *De Young v. Irving*, 5 A. D. 449. In 1912 the Court of Appeals of New York has, in a later decision, *Fitzwater v. Warren*, 206 N. Y. 355, discarded the doctrine laid down in the *Knisley v. Pratt* case to which my criticism applied and has adopted a rule in harmony with an enlightened public policy.

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the legislatures increased the responsibilities of employers; how few States have abolished the fellow-servant doctrine or changed the rule of assumed risk. We kill or injure, we are told, over half a million people in industrial employments in the United States every year.¹ Our own Commissioner of Labor some years ago estimated that in this State we annually cripple, kill, or injure forty thousand individuals in our industrial establishments. Yet we have made but rudimentary changes in the law. The Employers' Liability Act, adopted in this State in 1902, was not more advanced in its principles than that which England adopted in 1880 and had abandoned as inadequate five years before our own act was made law. Yet our statute took seven years to obtain its passage from the New York Legislature. The Federal Employers' Liability Act of 1905, the most far-reaching American Law on the liability of railroads to their employees, enacted after years of agitation, and now under a temporary eclipse as to its constitutionality,² is not more favorable to those

¹ See *North American Review* of November 16, 1906, "Our Industrial Juggernaut."

² Subsequently reënacted with Amendment and held constitutional. *Mondou v. New York, N. H. & H. R.R. Co.*, 223

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employees than the law of Prussia was in 1838.¹

With States vying with one another in increasing competition for trade, our legislatures

U. S. 1 (February 1912), reversing the decision by Chief Justice Baldwin, of Connecticut, which was the subject of the memorable controversy between Judge Baldwin and ex-President Roosevelt.

¹ The extraordinary change in public sentiment and in the attitude of the courts and legislatures upon this subject since this paper was written deserves something more than passing comment. The former apathy and indifference has disappeared and the problem of industrial accidents from the standpoint, both of prevention and of legal redress, is one receiving the most careful consideration. Some idea of the extent of this new interest may be had from the statement that within the past three years over twenty states have established commissions to investigate the condition of the law and of industry with reference to industrial accidents within their borders. In fifteen states Workmen's Compensation Acts adapted so far as possible to European models have been enacted, embodying sweeping and radical provisions, many of which never before existed in any American state. New York, which was a pioneer state, both in investigation and in legislation of this type, had its first statute declared unconstitutional in 1911 and in 1912 a proposed constitutional amendment was passed by the legislature, which if readopted at the present session will be submitted to the people for ratification, an amendment of a very broad character giving large powers of action on this subject to its legislature to overcome the objection of its highest court. The employers' liability legislation, which had been adopted in the last three years, is of a more fundamental character and broader in its sweep than that of any previous period in our history. Nor should the action of Congress be overlooked and the several enactments which have been adopted covering federal employees and servants engaged in interstate commerce on

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are not likely to impose handicaps which will drive business interests away from their borders. This hesitancy of the legislatures to place these interests at a disadvantage in competing with establishments in other States, coupled with the conservatism of the courts, have generally proved sufficient guaranties against meddlesome and unnecessary legislation, and such guaranties are likely to continue even if the police power be largely expanded to meet new conditions.

The danger from the increase of the police power is not great. The danger from judicial construction of that power which shall stop its expansion is more serious. Our social order has many enemies, enemies who find arguments for presaging its disintegration and decay in the enormous concentration of wealth, in the growth of the great corporations, in the financial dishonesty which has been so recently exposed in high places, and in the misery and wretchedness of thousands whose lives are exploited in industrial railroads. A great part of this new legislation is necessarily experimental, but the interest which has been aroused in the subject, the extent of careful analysis which has been made, the general willingness on the part of employers and great business concerns to have such legislative experiments undertaken to correct a crying evil in our law, is one of the most inspiring incidents in the history of industrial legislation in this country.

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try. But their arguments with all the exaggerations and falsehoods which may be added to them by a sensational press, while they may inflame the blood of discontent, will never carry general conviction, until the courts have first convinced the people that in the presence of social and industrial wrong the State is powerless to meet conditions which demand law; until the courts have convinced the people that, bound and fettered by an inflexible written constitution framed over a century ago, the State cannot exercise functions which the present needs of society require it to exercise.

The decisions of the courts which the Socialist looks for with eager expectancy — declarations of the paralysis of the State, of its inability to deal with economic problems by law — are, however, few and far between. Reactionary judges there may be at times who refuse to be our contemporaries, who look only to the past to judge the needs of the present; yet slowly but surely, as public opinion matures, the power of the State is expanding to protect as well as to punish, in a land wherein the recognized rights of the individual include not only liberty, but life and a fair field for the pursuit of happiness.

X

The Ethics of Production

X

The Ethics of Production¹

WHEN Charles Dickens came to this country in the forties, he found us, judging by "Martin Chuzzlewit" and the "American Notes," a very self-satisfied people. Second only to our indulgence in chewing tobacco, he found our indulgence in boastful expression of our own greatness and our supreme conviction that ours was the greatest country on earth and we, its greatest people. He felt constrained to expose to the pained senses of our grandparents the glaring error in our conceptions of ourselves. If Dickens should rise from his grave to-day and visit us again and once more write his impressions of us, I am sure he would still have for his main theme, the attitude of the American towards himself. But where he found buoyant self-satisfaction before, he would find in the present generation a curious twist in the other direction. We have grown rich and powerful, to be sure, and

¹ An address delivered in the Page Lecture Series at Yale University 1908.

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we are still proud of our development and of the prospects of the future, but with it, thank Heaven, we have greatly developed the capacity for self-criticism.

This discontent, which to-day is the prominent part of our self-criticism, has largely to do with our moral standards. The past few years have been prolific of distressing scandals, the Post-Office, the insurance revelations, the beef trust, and the constant succession of exhibitions of municipal corruption from New York to San Francisco. Now there is something foreign to the American temper about hushing up public scandal. So much has been put into print about our political, financial, and business corruption, that many good people have been made somewhat pessimistic; have been led to believe that these conditions are characteristic of American life; that we are degenerating morally; that we are interested mostly in money; in sound money and not in clean money, and in its quantity rather than in its quality or how we get it.

Pessimism has always a knowing air, and it usually has some definite superficial fact or other to point to as its justification. But the noticeable thing about these waves of general pessimism is

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that they usually seem to come a little too late. They tend to get strongest when the reason for coming has largely disappeared. If, for example, half a dozen of the depressing commencement lectures of the last year and the year before, on our moral decrepitude, had been delivered in the days when the ideal of American prosperity seemed to be nothing but material wealth, however come by, and the full dinner pail, these addresses would, in my judgment at least, have been somewhat opportune; but they were not particularly opportune when they were actually given. These academic pessimists remind me of an old lady in my native city who made a specialty of going in and talking about death to convalescents. Somehow she never seemed to get around to prepare her sick friends for death until after they were really beginning to get well, and she would then discourse on her favorite theme so earnestly that she quite overlooked the actual condition of the patient. I think of her sometimes when I read these pessimistic utterances concerning the present moral tone of American business life. These exposures as I see them are not so much indications of America sick as of America getting well. The cor-

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ruption we hear so much about is not new. The new thing is the desire to uproot and destroy it.

I have made this introduction because I want to be sure to make perfectly clear the spirit in which I approach my subject by expressing at the outset my own sincere conviction that the professional and business life of America, into which you are so soon to enter, has for its essential qualities, not decadence, but rather regeneration, in which moral forces have not lost ground, but are receiving a sure and constant increase of power.

I have been asked to talk to you about the ethics of production. So far as its human factors are concerned, production in a business sense involves three human relations. First, that of the producer to his own employees, by whose labor his wares are made; second, his relation to the trade, with the factors and retailers who handle his goods; and third, his relation with the public who buys those goods.

There is no subject of a social character which is receiving to-day more attention from both the general public and the business world than that of the relation of employer and employee. Now

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it is one of the easiest things in the world to lay down in general terms abstract propositions as to their reciprocal duties. Justice demands, for instance, that the employer should pay his employees fair wages, exact only fair hours of employment, and that the conditions of the employment should be such as to give due protection to the health and safety of the worker. The employee on his part should make by his labor just return for his wages. Thus far it is plain sailing, or rather it is not sailing at all, for we have not yet really embarked. The moment we leave the realm of abstract morality, the moment we begin to apply ethical principles to a going business, trouble begins. It begins, not because the principles themselves are false or that they become doubtful when tested by use, but because of certain considerations which render their application difficult.

You remember the colloquy between Morrell and Burgess in "Candida," and the retort of the hard old factoryman: "But arter all, you can't take everything a clergyman says serious, or the world could n't go on."

What we are interested in here is, I take it, not ideals in the abstract, which would prevent

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the world going on, but ideals capable of being worked into the processes of the world, ideals in conduct, and to consider from this standpoint some of the problems of industrial justice. We are not interested in an abstract employer in a hypothetical ideal business, but the actual employer in a concrete business world and the practical difficulties in the way of the industrial ideal.

Looked at from one point of view these practical questions do not seem even to exist. That point of view is the one which makes the whole matter of the treatment of the employee by the employer a purely individual one, and the responsibility for which is made to rest wholly with the individual employer. A good many difficulties may be made to disappear by the happy device of not looking at them. We use that method to a very large extent in our ordinary considerations of the employment question. Take a concrete illustration. A very large per cent of our ready-made clothing is made in the slums of the great cities in tenement houses, in ill-ventilated or unventilated rooms, by men, women, and very young children who work long hours for almost incredibly small pay. The class of producers who employ these poor people to make up these

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garments in these places we call "sweaters," and the sweater is the stock example of the bad employer. He is the blackest black sheep of the producing world. We call him hard names, and no doubt he deserves them all. But if we accuse the sweater of all the inhumanity with which his class is charged, he will answer it all by a very few words, simply expressed, which, to him at least, offer a complete reply to the whole indictment. He will say, "Do you know what the Broadway wholesaler pays me for making coats? Now you say I pay too little to my help. I answer," says the sweater, "if I paid more, if I did not work my people long hours, if I had no small cheap children to work for me, I could not compete for the wholesaler's trade. I should be put out of business by my competitors who work as I work now, and who would underbid me if I should change the conditions of my work. Shall I commit business suicide to gratify your kind heart?" It is easy for us to tell the sweater to commit business suicide. Such a gratifying demise costs us nothing. But suicide, business or otherwise, answers few problems.

Now you and I have very little use for the man who always cries that he is a victim of cir-

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cumstances. You remember Johnson's retort to the man who was excusing some rascality by saying, "One must live." "I'm not so sure of it," said the old doctor. I am not trying to defend the sweater, nor do I suggest that the frightful competitive struggle in which his business life is lived lessens his individual responsibility. I am simply calling your attention by concrete illustrations to one of the greatest practical difficulties of applying abstract rules of moral conduct to business.

Now this exaggerated illustration from conditions in the so-called sweated trades I have brought up to make you consider what the individual responsibility of the producer is in the face of that situation or other situations similar if less extreme. Competition has been and in many respects still is the root and basis of the producer's business life. In some industries competition is very intense, the margin of profit is very narrow. Where that competition is so intense, the practical difficulty standing in the way of the well-intentioned employer who wants to treat his employees fairly seems almost insuperable. What is to be done? How are the working conditions to be raised to a plane of decency?

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Now there are three solutions offered to this problem. One is to reach the conscience of the employer, to make him feel a greater moral responsibility for the welfare of his help, to make him anxious to improve their condition ; and, by exhorting him and at times by abusing him, make him clean up his shop, raise wages, and shorten hours.

I sometimes wish those of us who are interested in this particular method of improving social conditions would use more often the example of the good rather than the bad employer. It is always important to know just what can be done under existing business conditions. The best way to ascertain what can be done is to see what high-class employers are in fact doing and to try and make other employers comply with a demonstrably practical standard. Some time ago, one of the officers of a national organization interested in improving working conditions went to a New Jersey town to examine the glass manufacturing there, with particular reference to child labor. She went about at night, found these establishments running full blast, with little children busily engaged, carrying bottles to and fro all night long. One establishment, however, she

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noticed was dark. The next morning she went back to make sure that it was really closed down, and somewhat to her surprise found it in busy operation. The proprietor met her courteously and took her through the plant. There were no children except those obviously about the legal age. The general conditions were good. At the end of her visit she said inquiringly, "You do not run your plant at night?" "No," he answered. "Do you let your fires go out?" "Yes." "That costs you money, does n't it?" "Yes." "These other bottle-makers say they cannot afford to close at night and that competition compels them to use little children in their work." "Yes," he replied, "but I do not try to make so much money as my friends. I do not like to work at night, nor do my employees, nor do I care to rob the schools to get my help. My business is profitable enough and I am satisfied."

Now I say this was an interesting man, but while I know, as perhaps many of you know about the bad conditions so far as child labor is concerned in the glass manufactories, which are notoriously evil places for children, I cannot give you the name of this good employer who

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did not try to make so much money and who still "lived" in a business sense under the competition of his rivals. It would be more useful in the campaign against child labor if the facts regarding this man's business were publicly known than that we should have a good part of the shocking details of the employment of children in glass factories. For his business would show what a glass manufacturer *can* do if he chooses, under existing business conditions, and it would cover and meet the plea of economic helplessness so often urged by his fellows. Some time we shall become wise enough to follow this policy, and recognize the tremendous social value of such employers. There is no more useful man in business to-day than the man who establishes high standards and shows that they can be maintained in actual practice. One distressing thing about this story to me is in one simple fact, which I have omitted thus far, namely, this good bottle-man was a Frenchman !

Another method of improving industrial conditions is to encourage the workers to combine in trade-unions, and gain power by combination so that they can compel an unwilling employer to do the things which otherwise, but for their

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own insistence, he would have refused. This is good in its way, but after all permanent moral progress can hardly be made with a club. There is no special ethical quality in what a man does solely under compulsion. Another phase of this use of the labor-union I will consider later. To a very considerable number of people interested in improving business conditions for the worker, these two methods are the only methods for making practical progress. They oppose the third method of improving those conditions, which is to enact law which shall regulate at times the conditions of employment, sanitary and otherwise, and improve the method of conducting work. One objection usually urged to the enactment of law is that such law tends towards what is vaguely described as Socialism. Another is that you can't make men good by legislation. Those critics point out that English law centuries ago contained statutes under which justices of the peace yearly determined the wages which journeymen were to have, prescribed the length and breadth of cloth which should be made or used, and made other similar attempts at regulating industry, all of which failed. But there is a distinction between these meddlesome regu-

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lations contained in the old English law, which were made not to promote the interests of the worker, but to hamper him in his social progress, — to keep him where the higher classes thought he belonged, — and legislation which to-day endeavors in sundry instances to mitigate the hardships of over-competitive industry lest the competition should oppress the lives of countless thousands to make trade profits. The modern theory for this legislation has been so well expressed by Woodrow Wilson, that I quote from his book, "The State," the following:—

There are some things outside the field of natural monopolies in which individual action cannot secure equalization of conditions of competition, and in these also, as in the regulation of monopolies, the practice of government (of our own as well as of others) has been increasingly on the side of government regulation. By forbidding child labor, by supervising the sanitary conditions of factories, by limiting the employment of women in occupations hurtful to their health, by instituting official tests of the purity or quality of goods sold, by limiting hours of labor in certain trades, by a hundred and one limitations of the power of unscrupulous or heartless men to outdo the scrupulous and merciful in trade or industry, government has assisted equity. Those who would act in moderation and good conscience where moderation

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and good conscience to be indulged require an increased outlay of money, in better ventilated buildings, in greater care as to the quality of goods, etc., cannot act upon their principles so long as grinding conditions for labor or more unscrupulous use of the opportunities of trade secure to the unconscientious an unquestionable, and sometimes even a permanent advantage; they have only the choice of denying their consciences or retiring from business. In scores of such cases government has intervened and will intervene by way not of interference, by way rather of making competition equal between those who would rightly conduct enterprise and those who basely conduct it. It is in this way that society protects itself against permanent injury and deterioration and secures healthful equality of opportunity for self-development.

Organized society ought to be on the side of our friend the bottle-man. That he was able to live in competition with his child-exploiting rivals was entirely to his credit, not at all to ours. New Jersey still thinks it proper that children of fourteen should work all night long in the glass factories.

Now I venture to say that comparatively little of this type of legislation would be obtained to-day but for the acquiescence and at times the active assistance of enlightened em-

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ployers. The improvement in working conditions which has been made in the last quarter of a century has been great. We should not be discouraged. We complain of the conditions of child labor in the South, we complain of the sweated trades in our cities, and when we fail to consider the subject historically or on broad lines we find many of these pitiful stories of exploitation of young life, in these industries and in the coal-mines, exceedingly disheartening and distressing. But compare the woman working in the slums in the long hours of the sweatshop with the conditions in England in the first and second quarter of the nineteenth century, with the woman in the mines crawling on her hands and knees with a rope tied around her waist, dragging coal in crude buckets in narrow tunnels in which she could not possibly stand upright, working in dirt and mud, living in degradation and filth in the mine itself. Compare the breaker-boy picking coal in Pennsylvania with the chimney-sweep of the first quarter of the nineteenth century, struggling up and down blackened flues, through which the body could scarcely pass, often killed by the smoke or burned by the fire of the stove below, the

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chimney-sweep whom Sydney Smith describes in his essay, apologizing ironically for an interest, which in his day was so unusual, in "the dirty tears of the poor." In 1847, when the English factory act of that year was up for debate in Parliament, one of the most strenuous opponents to the limiting of hours of factory employees was that staunch friend of America, John Bright, one of the most high-minded men who ever sat in the House of Commons. Here is part of the speech which he made in 1847 on the proposed factory act:—

There is one consideration which the House ought to bear in mind with respect to the employment of women in factories. The assertion was that their labor in factories was extremely hard and long continued, but how did it happen that women were found in factories at all? *The very fact that they were there in large numbers was conclusive evidence that their labor in factories was not hard.*

Again he says:—

Did the Honorable Member from Dorsetshire forget that these children did not work more than six hours a day *until they were thirteen years old*? By interfering with the right to exert themselves, you are violating one of the greatest privileges and dearest rights of these people.

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I quote this because I think it illustrates the change in the attitude of our time towards this subject. Imagine, if you will, a speaker of national prominence, either in our country or Great Britain, giving utterance to similar sentiment to-day. The growth of the sense of pity has been one of the most remarkable features of our development in the last half-century. This combination of ignorance and lack of sympathy in Bright's speech jars upon us. It belongs to a less humane era than ours.

I am not advocating any diminution of the individual responsibility of the employer. What I am calling to your attention is the increasing acceptance of the principle of social responsibility to supplement it—a responsibility recognized and expressed in laws which limit the illegitimate advantage which the unscrupulous employer otherwise has over his more humane competitors, through his very willingness, without such restrictions, to oppress and exploit his employees.

Considering the lack of adequate acceptance as yet of this social responsibility (for it is fairly new doctrine with us), I think the general standard of treatment of employees in our industrial establishments is rather higher than might be

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expected. We have, for example, no laws such as exist in England, Germany, and France concerning industrial accidents. In England, as Mr. Asquith has pithily expressed it, "The blood of the workman is part of the cost of the product"; that is, the law assumes that accidents are an inevitable part of the very workings of a producing business, and should for that reason be recognized as such and paid for by being made part of the cost of the goods themselves, just as rent, insurance, machinery, etc., is added to that cost. With us, however, that principle, one that President Roosevelt has advocated recently in two messages, is not recognized, and all but an insignificant part of the burden of industrial accidents falls solely so far as the law is concerned upon the injured employee. Notwithstanding this, many American employers, particularly in large establishments, are voluntarily assuming for themselves responsibility for these accidents, paying wages during disability, providing medical attendance, and making a general compensation for them. The tendency to do this, I think, increases. Most of the great railroad companies contribute to railway relief associations created for the purpose of caring

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for injured employees hurt in the service. The United States Steel Company has a very elaborate system of this kind, maintaining a large hospital and dispensing thousands of dollars on the accidents which are inevitable in its huge plants. I know of a number of large companies in New York who do the same thing. An employer who does these things has of course to compete in the market with the employer who does not. The good employer has to meet the bad employer's price list ; he has to carry the handicap which the expense of the accidents puts upon him and still hold his own in competition with the others. The fact that an increasing number of employers are thus making the laws for themselves which the State has not imposed upon their competitors is at once encouraging and inspiring.

Those who complain that the ethical standard of treatment of employees by employers is below what it should be should bear in mind this handicap. We are still strongly individualistic in the old sense of the term in our notions of law. We have still a theory of liberty which guarantees to the worker individual rather than industrial freedom. We guarantee the adult against interferences with the number of hours

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he can work, instead of limiting those hours where fierce competition tends to make them too long. We guarantee him the right to work, exposed to unnecessarily dangerous machinery, and our law assumes, because he works there, meeting those dangers, that being a free man he has accepted or assumed the risk of being maimed or killed, it being part of his liberty to work in danger rather than in safety.¹ It guarantees him the right to buy his supplies at the company stores, where the supplies are often sold far above market rates at enormous profit to the company maintaining them. It is a part of his liberty to purchase his goods there rather than to be protected against extortion by positive law. We guarantee him this specious liberty because we still assume, as a basis for industrial life, the existence of a theory which is often en-

¹ Recent changes have made this statement, in so far as it relates to most of the great industrial states, no longer true. In many states in which this cruel rule was the law as declared by the courts, a contrary rule has been established by legislation. The Court of Appeals in New York in a recent decision (*Fitzwater v. Warren*, 206 N. Y. 355, decided in October, 1912) has recanted its former doctrine and has laid down without legislative compulsion a more humane and enlightened rule in harmony with an important decision (*Narramore v. C. C. & St. L. Ry. Co.*, 96 Fed. 298) rendered many years ago by President Taft when serving on the Federal Bench.

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tirely contrary to the plainest facts of common knowledge ; that is, we assume the existence of a condition of individual equality under which no constraints through his necessities can be too burdensome to be borne by the worker.

The continuance of this theory, our failure to recognize its necessary limitations, amounts to an insistence upon industrial warfare rather than industrial peace. As I have said a few moments ago, there are those who believe that the worker's social advancement should be forwarded by the labor-union, not by the law. If the employee is to have only those industrial rights which he can get by combination with his fellows, if his union must give the main protection for his life and happiness, there is bound to occur a certain diversion of loyalty from the State to the labor-union. We cannot afford in a democratic country like ours, where everybody has a vote, to alienate the worker from the State by over-strengthening his loyalty to his union. I am reminded of this by an incident which occurred on the East Side in New York a few years ago, when a young reformer sought to lecture an East Side Hebrew baker for having sold his vote at an election. He reminded

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him of the duty he owed as a citizen to the State to cast an unbought ballot. The man replied, "I got \$3.50 for my vote. You show me where the State has ever been worth \$3.50 to me and I will never sell my vote again; but you can't do it." This incident occurred shortly after the United States Supreme Court had decided that a law limiting the hours of labor in bakeshops, many of them unspeakable underground ovens, was unconstitutional as depriving those workers of "liberty" without "due process of law." It might, therefore, be assumed that the baker had considered the value of that liberty when he sold his vote, and had concluded that it was of comparatively less value than the bribe he had accepted.

Considering now the relation of the producer to his retailer and the public, I realize the impossibility of making any safe generalizations. There are those who consider that trickery in business is on the increase; that fraud and adulteration in goods have become a general practice; that the habit increases of paying special commissions to buyers and purchasing agents, which are nothing less than bribes for the placing of goods with retailers. The basis for this opinion

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must be found largely in the fact that we are enacting laws to cut out the trickster, to punish the man who steals his rival's trademarks and who is guilty of adulteration and substitution. Our National Pure Food Law has done much to bring out information regarding these dishonest devices of unscrupulous manufacturers and dealers in foodstuffs. But pure food laws are not new. It is the enforcement of them which is new. We are putting the patent medicine where it belongs. Some of the things we have learned about these medicines make rather lurid reading, but bear in mind this, that the facts we have found out about them have come out in a campaign to stop them. The value of the beef trust investigation did not stop with the meat industry. The number of big business establishments whose owners cleaned them up carefully, for fear that some similar *exposé* might come to them, is much greater than the public realizes.

We are just beginning to take measures to stop one disheartening form of business competition, that is, the grafting commission. In business I sometimes think that to day everybody in business wants a "commission" he is not entitled to on something. In the fight for trade

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even large and prosperous houses have adopted methods which cannot be fairly distinguished, except for the lack of bloodshed and physical risk, from the methods of the burglar. The moral difference is inappreciable between the burglar who enters a man's house by having an inside accomplice who opens a door or a window and the producer who gets into the same man's business establishment downtown by bribing his buyer or purchasing agent to purchase goods. Now we must admit that in recent years there has been a decided increase in the number of so-called commissions of the illegitimate kind offered to or demanded by all sorts of employees, purchasing agents, buyers, and the like in business establishments. It is a great evil. It is not peculiar to producing business. It permeates the whole of our commercial and financial life. Personally I am inclined to trace the increase in business practices of this kind to the tremendous and practically unregulated development of what may be described as the fiduciary principle in our modern business life. The corporation as we have it to-day in America is doing the greater part of our business. Men are employed in corporations practically as trustees for the stock-

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holders. An impersonal employer, consisting sometimes of thousands of individuals scattered broadcast over the land, is substituted for the old definite personal employer near at hand who watched the processes of the business. Our corporation laws have thus far been exceedingly loose. Many of them afford extraordinary and immoral protection to promoters and organizers in making large and highly questionable profits at the expense of the investors who subsequently put the actual capital into the company by buying its stocks and bonds. The extraordinary temptations afforded by these and other opportunities given to men in control of corporations has had its natural result. There has grown up a class of misnamed financiers, who, taking advantage of these loose laws, have made fortunes through essentially dishonest but not yet criminal practices. As it becomes generally known by the subordinate in these corporations that fortunes are being made in this way by their superiors, a strong temptation is created in the rank and file to follow their example. The railroad purchasing agent, for example, who sees the officers and directors above him making profits through stock and bond deals, through con-

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struction contracts made with themselves through dummies and the like, has a strong temptation to follow the example of his superiors. The effect of these examples is not limited to railroad or corporate business, but is reflected throughout the whole range of commercial life. The buyer must have a commission for treachery to his employer; the clerk must have his graft, and so on up and down the line. The worst of it is that this kind of business has gone on for so long that it has become a sort of a custom. The drastic methods which are being employed are needed to root it out. Public opinion must be still further aroused against this prevalent form of dishonor, this growth of treachery. We are all of us responsible for the lack of an active public conscience on this matter. We must quicken the individual conscience. We must make commercial bribery and corporate breach of trust odious through public disapproval. We must have law which will help us, and we must enforce that law. In New York a statute was passed two years ago on this subject. The Supreme Court, speaking of it in a recent decision, says :—

The corrupt practices of secretly offering bribes to servants, agents, and employees, to induce them to place

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contracts for their masters or employers, has spread to such an alarming extent in this State that its viciousness and dishonest and demoralizing tendencies attracted the attention of the legislature and led it to declare it to be a misdemeanor to give or receive such a bribe.

This law is good in its way and the enforcement of it will produce good results. But, after all, what we really need is law adequate to reach not the small fry, but the great offenders whose success and example cause others to offend, college-endowing, church-building men whose greatest public service would be a term in jail. We college men stand disgraced by what men of our own class do with their education. We cannot hope to make law which shall make such speculation impossible, which shall surely punish it in all cases. Social ostracism is a better weapon. It is our fault that we do not use it. The test of the value of university training for the life of our day is right here: What does it contribute towards the higher ideal of success? There is no curse to a country like the increase of intellect without character. The vital problem in America to-day is the definition of success. No man who reads or thinks can doubt the growing strength of the moral forces which seek to

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define that word, so that it shall mean *only* something to which an honorable man can with good conscience aspire.

There is no reason for losing courage or getting cynical. There are many reasons for expecting better things. As we get older as a people, business tends to get a certain stability which it could not have in our restless youth. In the new community the man who keeps a grocery to-day may start a bank to-morrow. He is looking for the main chance. He is not sure whether he will stay in the place or in the business. He looks to the immediate profit and takes short views of the business itself. He is looking more for quick money to be made out of that business than for the good name of the business itself. As we settle down, all this rather tends to change. The man in a particular business expects to stay in it and is more inclined to establish permanent relations with the business itself. The thing which gets more important as a business asset as we grow older is the good name of the house.

There are still thousands of producers, to be sure, who rely overmuch on the great American idea of advertising more than on the qual-

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ity of their goods. We know more about how to advertise than any country in the world. It has its great value, though we undoubtedly overdo it and overlook its necessary limitations. Advertising at best is a sort of industrial fertilizer, and the best of fertilizers is no substitute for soil. A name may become widely known by advertising, it can become *well* known only by the goods themselves and the methods by which they are sold. The permanent good-will of the house which Lord Eldon defined as the prospect that the old customer will return, is and must be based on the character of the house and not on the advertising.

Last summer in London, a friend of mine on his way home one day saw an old Sheffield teapot in a shop window. He took a look at it, fancied it, and told the proprietor to send to his house for another teapot which he had but did not like, and make such allowance on it as was proper and send up the new teapot with a bill for the difference. Of course he did not know what allowance would be made on the teapot which he had, and I asked him if he was not taking a risk in doing business this way. "Well," he said, "this is one of those old Lon-

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don shops. They have been on that spot for a hundred and fifty years, and they have a reputation which is of more importance to them than an extra profit on this particular transaction. They expect to be on that spot for a hundred and fifty years more and they expect to see me again."

Now I think we can find this same spirit and desire for the name of the house growing with us. The producer, of course, has to be influenced by the spirit of the retailer, and the largest and most substantial retail houses have, with few exceptions, this motto, "Make a customer rather than a sale." I am told that in the largest retail house in this country, the second in the world, the surest road to dismissal is the slightest misrepresentation of goods.

We are in the business world losing that discreditable admiration for "smartness" — that cheap combination of shrewdness and guile which in years past we so highly esteemed. We are losing our regard for it because, as we take longer views of business, as we consider it more as a permanent occupation rather than a temporary and changing condition, the cheap shrewdness of commercial trickery proves itself a fail-

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ure. Solider qualities are to-day needed for substantial business success. In the professions something more than money is essential to professional eminence. There are rich shysters and rich quacks, but we do not commonly call them successful. We withhold the word, because success in the profession implies observance of the set standards of professional conduct. In the same way standards are being set in the commercial world, indirectly perhaps and often almost unconsciously through trade guilds, merchants' associations, credit associations, and the more frequent meeting of merchants for the exchange of views. A business house has to-day a much more definite relation to the trade than formerly. Just as the rich quack or the rich shyster lacks a subtle something which makes success, something which robs him of joy in his work, so the merchant or the producer who merely makes money, loses, and what is more *feels* that he loses, something essential when his practices have got him a bad name in the trade. How much oftener I hear used phrases which mean moral standards in the business world, phrases cast off carelessly in conversation on business topics—so and so, solid old house,

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high-class concern ; so and so, big house but a bad name in the trade. These simple phrases as merchants use them mean much, for they indicate the development of commercial standards of success.

We are often discouraged, no doubt. We see things and we read things which seen too closely make us lose that perspective needed for just conclusions. But after all, as our vision clears, as we regain that perspective, we can see, surely and not slowly building under our eyes, on solider foundations, the moral framework of American business, building on principles which recognize character as the great basis of credit and an approximation to the Golden Rule as an essential part of the name of the house.

THE END

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